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No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

In Re:

TONY SLOAN, LOLA BETTYE SLOAN, NED T. SLOAN, JIMMIE SLOAN, MARGARET SLOAN, BRUCE SLOAN, and JOHN A. SLOAN - - - - - **Petitioners**

JOE LEE, Bankruptcy Judge, U. S. District Court for the Eastern District of Kentucky - - - - - - - - **Respondent**

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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154 pp

QUESTION PRESENTED FOR REVIEW

I. Should a Writ of Mandamus be issued by the Appellate Court, without delay, to compel the Inferior Court on remand to obey its mandate, to confine the Inferior Court, on remand, to the lawful exercise of its prescribed jurisdiction, to compel the Judge of the Inferior Court to obey the express language of 28 U.S.C. 144, and to compel Orders issued by the Inferior Court contrary to 28 U.S.C. 144 to be set aside.

LIST OF PARTIES

Rule 23 of the United States Court of Appeals for the Sixth Circuit required that the names of the Petitioners, only, be listed in the caption. The parties to this action are all of those Petitioners as listed herein, and the Honorable Joe Lee, Bankruptcy Judge for the United States District Court for the Eastern District of Kentucky, and Ruben G. Hicks, Trustee. The Honorable Joe Lee would be the Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 85-600

In Re:

TONY SLOAN, LOLA BETTYE SLOAN, NED T. SLOAN, JIMMIE SLOAN, MARGARET SLOAN, BRUCE SLOAN, and JOHN A. SLOAN - - - - - - - - *Petitioners*

JOE LEE, Bankruptcy Judge, U.S. District Court, Eastern District of Kentucky - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a Writ of Certiorari to review an Order of the United States Court of Appeals for the Sixth Circuit denying a Petition for Writ of Mandamus to compel Bankruptcy Judge, Joe Lee, of the United States District Court for the Eastern District of Kentucky, to comply with the judgment-mandate of the United States Court of Appeals for the Sixth Circuit; to compel Judge Lee to dismiss the action brought by the Trustee in Bankruptcy because said action is not within the jurisdiction of Judge Lee's Court, and to compel recusal of Judge Lee and his compliance with 28 U.S.C. 144 and 455(A), by setting aside actions taken by Judge

Lee after the Motions, and Affidavits for Recusal were filed.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit denying Mandamus was entered on October 10, 1986. It is not reported, but is contained in Appendix 1 (pp. 1a-2a).

The Opinion of the United States Court of Appeals for the Sixth Circuit, which the Petitioner for Writ of Mandamus sought to enforce, is reported at 761 F. 2d 319 (1985), and reprinted Appendix 2 (pp. 3a-10a).

The Opinion of Judge Siler, United States District Court for the Eastern District of Kentucky, which was affirmed in part and reversed in part by the 1985 Opinion of the Sixth Circuit, is not reported but is printed in Appendix 3 (pp. 11a-21a). The Order overruling a Petition for Rehearing entered by the 6th Circuit on January 6, 1987 is in Appendix 4 (p. 22a).

The Findings of Fact and Conclusions of Law, Judgment, and Orders granting temporary restraining order and preliminary injunctions by Judge Lee after Motions for Recusal were filed are set out in the Appendix 5, 8 (pp. 23a, 30a).

STATEMENT OF JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit denying Mandamus was entered October 10, 1986. A timely Petition for Rehearing, en banc, was denied by Order of the Court of Appeals

on January 6, 1987. This Petition for Certiorari was filed within 90 days of the Order denying the Petition for Rehearing.

This Court's jurisdiction is invoked by Petitioners pursuant to 28 USC 1254(1).

STATUTES AND RULES INVOLVED

28 USC Section 1651, Appendix 9 (p. 30a).

11 USC Section 110(b) (Pre-Bankruptcy Code), Appendix 10 (pp. 30a-31a).

28 USC 144 and 28 USC 455(a), Appendix 11-12 (pp. 31a-32a).

Supreme Court Order of April 24, 1973, Appendix 13 (p. 33a).

STATEMENT OF CASE

The unusual circumstances giving rise to the Petition for Mandamus in the Sixth Circuit started 14½ years ago with the filing of a Chapter XI Bankruptcy Petition under Act of 1898, as amended. The bankrupt was the lessee, with an option to purchase, of a Lease Purchase Contract of coal underlying approximately 3,000 acres owned by the Petitioners.

The facts are undisputed. The 1970 Lease Purchase Contract required mining of coal for a period of 10 years and 3,000,000 tons before any title could be obtained to the remaining coal. It contained many contract terms of future performance for both parties. It had plain and clear rights of cancellation and termination of the contract by both parties on default and in performance, or for any reason, or on cessation of mining operations. Prior to bankruptcy in May, 1972, notices of termination in writing, and orally, had been

given. An amendment to the original contract gave a right of immediate termination to the petitioners. By petition filed in August, 1972, seeking to order the Trustee to reject the contract, the Petitioners had also declared the contract terminated. From 1972 to date, the Trustee has never assumed the contract or performed any of its terms or conditions.

From the beginning, the Bankruptcy Judge refused to recognize the contract as executory, refused to obey the mandatory language as to rejection expressed in 11 USC 110(b), and the Supreme Court Rule of April, 1973; refused to recognize the contractual rights of cancellation, upheld by both the Federal Courts and the Supreme Court decisions; refused to recognize, on remand after appeal, the plain language of the United States Court of Appeals which declared the entire contract executory and which did not award the Trustee any interest or title therein; and refused to obey the prohibition expressed in 28 USC 144 and 455(a) by holding hearings and entering Orders after Motions for Recusal were made and before ruling thereon; and has refused to dismiss the Trustee's action to claim title to the coal, despite an obvious lack of jurisdiction due to the Trustee having failed to assume the contract or perform any duties thereunder from and after the inception of bankruptcy more than 14 years ago. In effect, Judge Lee has reinstated his own opinion of 1976, contrary to both the judgment of Judge Siler, District Judge, and the Sixth Circuit, which affirmed Judge Siler in part and reversed in part and remanded.

When respondent Lee entered an Order in June of 1986, sustaining a non-existing Motion of the Trustee to assume the contract, and giving the Trustee another 100 days to assume after no further appeal could be taken; and when Judge Lee enjoined an action brought by the Petitioners in the Kentucky Circuit Court against Third Parties to require enforcement of Kentucky mining statutes, and to which action the Trustee was not a party, then, Petitioners were finally and completely convinced that Judge Lee was partial to the Trustee and would not obey any decision except his own. A Petition for Writ of Mandamus was then brought in the Sixth Circuit.

The Petition for Writ of Mandamus in the Sixth Circuit (Appendix 14, pp. 34a-59a) set out the unusual and exceptional circumstances of this case, recognizing and citing therein Supreme Court cases to the effect that mandamus is an extraordinary remedy, that exceptional circumstances must be shown amounting to a judicial "usurpation of power," that it is not a substitute for appeal, and that a clear and indisputable right to the writ must be demonstrated.

We believe that the Petition (App. 14, pp. 34a-59a) set forth ample and most unusual behavior of the Respondent, Judge Joe Lee, to justify the issuance of the writ. Judge Lee filed a Response to the Petition (App. 15, pp. 60a-62a). Interestingly, the Response did not deny any of the facts set out in the Petition. Instead, it argued that the 60 day requirement for rejection under Bankruptcy Rule 607 (old rule) was not applicable. The Response ignored the import of the Supreme

Court Order of April, 1973 (App. 13, p. 33a), and the 60 day requirement of 11 USC 110(b) (App. 10, pp. 30a-31a). The Response then attempts to excuse the period of at least six (6) years in which this case was pending in his Court, and during which time the Trustee could have assumed the contract, by pleading an overcrowded docket. We know that his docket was crowded, but we do not agree that this fact compelled him to withhold judgment for many years, due to the fact that he had a great number of small consumer personal bankruptcies.

When it appeared that Judge Lee's Response had not addressed the facts or the law set out in Petition for Writ of Mandamus, Petitioners filed a Reply thereto (App. 16, pp. 62a-67a). The Reply pointed out that if Bankruptcy Rule 607 did not apply, the Supreme Court Order of April, 1973, required that the former procedure as set out by 11 USC 110(b) had to apply, and that both the case law and the former statute compelled assumption or rejection within 60 days unless extended. (Time was never extended to assume the contract until June, 1986, fourteen (14) years later, and there was no Motion before the Court for further extension at any time since 1972).

The Trustee then filed a Response (Appendix 17, pp. 68a-77a).

Because the Trustee's Response was inaccurate, to say the least, the Petitioners filed a Reply (App. 18, pp. 78a-109a), pointing out the misstatements of Trustee, and showing to the Court that the Petitioners had filed a motion for Appeal in June, 1986, to the United States District Court for the Eastern District of Ken-

tucky. The Motion for Appeal, the Answer thereto, and a Reply are a part of Appendix 18 (pp. 87a-109a). (This Motion for Appeal has never been acted on by the District Judge.)

On October 10, 1986, an Order denying the Petition for Writ of Mandamus was entered by the Sixth Circuit. Petitioners filed a Petition for Rehearing, en banc, (App. 19, pp. 110a-121a), showing that the issuance of a writ in this case fell squarely within the Supreme Court decision for issuance of mandamus writs to correct the misapplication by the lower court of an Appellate Court's mandate. It was pointed out that unless the Appellate Court enforces its mandate, an Appellant can never be successful, even though the appellate decision is in his favor. Apparently, the Petition for Rehearing made an impression upon the Trustee, if not the Court, because the Trustee filed a Response thereto (App. 20, pp. 121a-125a). It appeared that the Trustee's Response was more of a personal attack on counsel rather than a response to the facts and the law of the case. Again, Petitioners filed a Reply to point out specifically the inaccuracies of the Trustee's statements (Appendix 21, pp. 126a-130a).

On January 6, 1987, the Sixth Circuit entered its Order denying the Petition for Rehearing (App. 4, p. 22a), and this Petition for Certiorari resulted.

REASONS FOR GRANTING THIS WRIT OF CERTIORARI

This writ should have been granted for the following reasons:

ARGUMENT I

An Inferior Court, on Remand After Appeal, Must Enforce the Judgment of the Appellate Court as Written. To Ignore the Appellate Court's Decision and Substitute Its Own is Clearly a Judicial Usurpation of the Power of the Appellate Court.

While this case has received no local or national publicity, probably because the press has not been made aware of it, we believe that the principles involved here do have national significance. For over 14 years, the Petitioners have been trying to require the Bankruptcy Court to follow the doctrine of stare decisis, to obey the statutes and rules as written, and finally to obey the literal language of an Appellate Court mandate, all to no avail. To require seemingly endless appeals in order to rectify the Inferior Court's misconception of the Appellate mandate, renders our judicial process much less effective. If the rule is laid down by this Court that a misconception of the appellate mandate or the refusal to obey it by the lower court, on remand, should be corrected without delay by mandamus, then we believe that many further appeals would be eliminated, justice would be more promptly served, and lower courts would be much more careful in following the exact language of their appellate mandate. In the instant case, in view of the undisputed facts, we can think of no reason for the refusal of the Writ of Mandamus by the Sixth Circuit other than as stated in *9 Moore Federal Practice,* Section 110.28 at Page 311, "Denial may be based upon nothing more than a disinclination in a particular case."

It would seem that mandamus is necessary, as stated by *9 Moore Federal Practice,* 110.28 at Page 309, on mandamus:

> It continues to be necessary, of course, to prevent District Judges from embarking on frolics of their own . . . and is used to prevent a Judge from preceding contrary to a recent decision of the Court of Appeals.

We firmly believe that once this rule is positively stated by the Supreme Court requiring the Appellate Court to enforce its judgment or mandamus after remand to the Inferior Court in the same case, that this issue and these problems would be laid to rest, and would perhaps prevent much further litigation.

This Court recognized the urgency of enforcing its own mandate in a case where the lower court, on remand, misconstrued the import of the appellate decision. This was in *United States* v. *Haley,* 371 U. S. 18, in which the Court said:

> The District Court erred in believing it was not foreclosed from inquiring into this Court's jurisdiction over the government's appeal and from reinstating its own original judgment in the case, which appears to have been the effect of its denial of the government's motion for judgment following remand. See *In Re: Sanford Ford and Tool Company,* 160 U. S. 247, 255, 40 L. Ed. 414, 416, 16 S. Ct. 291.
>
> The District Court's error should be rectified without delay and we think that the proper means for accomplishing this is by mandamus. 28 U.S.C.

1651; See *In Re: Potts,* 166 U. S. 263, 41 L. Ed. 994, 17 S. Ct. 520; *United States* v. *United States District Court,* 334 U. S. 258, 263, 264, 92 L .Ed. 1351, 1355, 68 S. Ct. 1035.

In the instant case, the Appellate Court stated that the contract terms were not altered and also stated that by the amendment to the contract, the Petitioners had an immediate right of cancellation. The Respondent refuses to recognize these holdings and has proceeded, in effect, as if no cancellation of the contract has ever taken place. The cancellation of the contract, of course, was brought to the Respondent's attention on many occasions. In this regard, he has proceeded as if no appeal was ever taken. If the *Haley* decision, *supra,* is a correct statement of the law, then, the Sixth Circuit should have corrected this misconception immediately by issuance of its Writ of Mandamus.

We believe that the Supreme Court very carefully chose its words in *Haley, supra,* namely, that the misconception of the lower court "should be rectified without delay and the proper means for accomplishing this is by mandamus." We believe these words leave no doubt that remedy by appeal and the attendant delay, should not be tolerated in enforcing an appellate judgment, on remand.

As this Court knows, from its judicial relationship with all of our Federal Courts of Appeal, delay on appeal is inevitable. We believe, that for this reason alone, the Sixth Circuit abused its discretion and refused to follow the guidelines of the *Haley* case, by its denial of the Petition for Mandamus.

ARGUMENT 2

Title 28 U.S.C. 144 and 455(a) Should Be Enforced As Written.

Another question which we believe to be of importance nationally in our jurisprudence is the meaning of the language set out in 28 USC 144, which states, in part, as follows:

> Whenever a party to a proceeding in a District Court makes and files a timely and sufficient Affidavit that the Judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such Judge shall proceed no further therein, but another Judge shall be assigned to hear such proceeding.

and

28 USC 455(a):

> Any Justice, Judge, or Magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

We submit that the language in these two sections of the United States Code is very plain, positive, and compelling. The word "shall" is used in both sections and has always been held to be mandatory when used by the Court or by a statute. There are many decisions annotated under both sections, many of which are contradictory in their interpretation of these two statutes. In the case at bar, it seems the Sixth Circuit has refused to follow its own opinion of *Roberts* v. *Bailor*,

625 F. 2d 125 (6th Cir. 1980). Perhaps a clear decision by this Court indicating that the refusal of a lower court Judge to obey the mandates expressed in these two statutes can be immediately corrected by mandamus would settle this question once and for all. This is not to suggest that frivilous, unfounded, insufficient Motions for Recusal should be upheld. But, when the "reasonable man" test used in *Roberts* v. *Bailor, supra,* is used, the statute should be obeyed.

ARGUMENT 3

AWrit of Mandamus Should Be Available as a Matter of Right in Those Cases in Which it is Clearly Established, Both in Fact and in Law, That the Lower Court is Proceeding Totally Outside Its Jurisdiction.

Why should an innocent party, whose rights are being dealt with by the Inferior Court, and which rights are totally outside the jurisdiction of that Court, be subjected to the hardship, expense, and delay caused by having to appeal the lower court's erroneous assumption of jurisdiction? If the Petitioners here were prisoners here being held on a matter totally outside the jurisdiction of the Court to hold them, this Court, or any Appellate Court, would grant a Writ of Habeas Corpus without delay. Isn't a Writ of Mandamus in similar circumstances in a civil matter as much an entitlement of the civil "prisoner of the Court" as a Habeas Corpus would be to a person charged with a crime?

There is no question, in this case, but that the lower court is proceeding without jurisdiction. The contract

has been unequivocally, undeniably cancelled, and by its very terms has terminated. It is an executory contract.

This Court has ruled in *Thompson* v. *Texas-Mexican Railway Company,* 328 U. S. 134 (1946) that:

> if the other party had a right to terminate the arrangement, that right survives adoption of the contract by the Trustee.

If the contract is terminated and the Trustee has no further interest therein, then the coal which was the subject of the contract is outside the jurisdiction of the Bankruptcy Court. Likewise, if the Trustee has failed to assume a contract under 11 USC 110(b) within the time period allowed, the Bankruptcy Court has no jurisdiction of the contract. A great number of Federal Circuit Court of Appeals cases so hold. One of them, *In Re: Lovitt,* 757 F. 2d 1035 at 1040-1042, (9th Cir. 1985) emphatically states this principle as follows:

> Thus executory contracts and leases—unlike all other assets—do not vest in the trustee as of the date of filing of the bankruptcy petition. They vest only upon the trustee's timely and affirmative act of assumption. (citing several cases)
>
> Because rejection of an executory contract is retroactive to the date of filing of the bankruptcy petition, such a contract never becomes a part of the bankruptcy estate. (citing several cases)
>
> A Bankruptcy Court has no jurisdiction over assets outside the bankruptcy estate, and therefore lacks authority to approve their sale or transfer.

In this case, for a period of 14 years, the Petitioners have been insisting that the Trustee has never assumed this contract; that it is executory; that it has been cancelled; and that the lower court has no jurisdiction over it. This has been going on for a period of over 14 years through a process of a great many hearings, two appeals, a Petition for Certiorari, a Petition for Mandamus, and a presently pending appeal. Isn't this a prime example of the injustice incurred by the total unwillingness of the lower court to accept, and abide by the terms of a contract, by the terms of the statutes, and by the terms of the Appellate decisions?

While we think the *Haley* case, *supra,* was definite and certain enough to establish the rule that a mandamus should be issued without delay to correct the misconception of the lower court as to the Appellate Opinion, on remand, the Sixth Circuit ignored *Haley.* Obviously, it did not follow the case. Perhaps in order that other litigants not be faced with this same problem and which may perhaps exist now in many cases, the Court should lay down a more definite and certain set of rules as to when mandamus should issue under circumstances similar to those at bar.

CONCLUSION

We respectfully submit that this Petition for Certiorari should be granted for the reasons set out in the argument above.

We think there is a pressing need, under the present state of all our case law, for this Court to establish

more definitive guidelines as to when Writs of Mandamus should be issued.

The Appellate Court should be required to issue a Writ of Mandamus immediately to correct the lower court's willful disobedience of the exact terms of the appellate mandate. Leaving the enforcement of the mandate to further appeal processes renders the appellate judgment impotent and useless. Often, the subject matter of the appeal, such as, coal in the ground, will have been removed by the time the appeal process becomes final. Another question could be asked—Why obtain another appellate decision from the failure of the lower court to obey the appellate judgment, if the Court will not enforce the decision rendered on the first appeal?

Perhaps the law should be rewritten to require the issuance of a Writ of Mandamus to compel obedience to the appellate mandate when it is clearly and indisputably shown that the inferior court refuses to carry out the appellate decision. Examination of the pleadings filed in the mandamus proceeding in this case in the Sixth Circuit leaves no doubt that the mandamus should have been issued, and that failure to do so was an abuse of discretion. These pleadings, set out in the appendix of this Petition for Writ of Certiorari for the aid of this Court, portray graphically the reasons why this writ should have been granted.

No less standard should be set for the Appellate Courts to "rectify without delay," by mandamus, a District Court error in application of its mandate, than the Supreme Court set for itself in *Haley, supra.* The

judiciary should be strong in this regard from top to bottom. It should not have "feet of clay."

Under the facts and law of this case, the issuance of mandamus should be mandatory rather than discretionary. It is hoped that this Court would see fit to set down the rules under which a Court below is absolutely required to issue its mandamus to carry out its decision, and to confine the lower court to the lawful exercise of its jurisdiction, rather than to leave such decision to the discretion of the lower court.

It is respectfully requested that this Petition for Certiorari be granted; that this case demonstrates the need for stronger rules to enforce appellate decisions as rendered, and to enforce the statutes and Court rules as written.

Respectfully submitted,

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APPENDIX

APPENDIX 1

No. 86-5731

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In Re:

TONY SLOAN, LOLA BETTYE SLOAN,
NED T. SLOAN, JIMMIE SLOAN, MARGARET SLOAN,
JOHN A. SLOAN, - - - - - - - *Petitioner,*

ORDER—Filed October 10, 1986

BEFORE: MERRITT and JONES, Circuit Judges; and EDWARDS, Senior Circuit Judge.

This matter is before the Court upon the joint petition for a writ of mandamus filed by Tony Sloan, Lola Bettye Sloan, Ned T. Sloan, Jimmie Sloan, Margaret Sloan, Bruce Sloan, and John A. Sloan, pro se; supporting exhibits; a response from bankruptcy judge Joe Lee; the bankruptcy court's docket sheet; the petitioners' reply to Judge Lee's response; the trustee's response to the petition; and, the petitioners' reply to the trustee's response.

Petitioners seek a writ of mandamus compelling the respondent, Judge Lee, (herein respondent) to comply with the exact and literal language of this Court's mandate; compelling the respondent to dismiss the trustee's Adversary Proceeding 14 for the reasons that this Court awarded the trustee nothing and the respondent lacks jurisdiction, if the trustee has no interest; compelling respondent to recuse himself; setting aside and avoiding the judgment and orders entered by respondent after the recusal affi-

davits were filed; and directing the respondent to entertain no further proceedings on behalf of the trustee against the petitioners.

A writ of mandamus is an extraordinary remedy, *see Kerr* v. *United States District Court for the Northern District of California,* 426 U. S. 394, 402 (1976), and should be granted only if the petitioner shows a clear and indisputable right to the writ, *In re Rice,* 155 U. S. 396 (1894); *In re Post-Newsweek Stations, Michigan, Inc.,* 722 F. 2d 325, 329 (6th Cir. 1983), and there is no other adequate means to attain the requested relief. *Kerr* v. *United States District Court for the Northern District of California,* 426 U. S. at 403.

Upon consideration, we conclude that the issuance of the writ would not be appropriate to compel any of the actions enumerated by the petitioners. It is, therefore, ORDERED that the petition for a writ of mandamus is denied.

Entered by Order of the Court

(s) John P. Hehman
Clerk

APPENDIX 2

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 83-5846, 83-5847.

In re

BECKNELL & CRACE COAL CO., INC., Bankrupt.
LOLA GAY SLOAN, et al., Plaintiffs,

TONY SLOAN, LOLA BETTYE SLOAN, NED T. SLOAN, JIMMIE SLOAN, MARGARET SLOAN, and BRUCE SLOAN, Plaintiffs-Appellants, (83-5846),

---

JOHN A. SLOAN, - - - - *Plaintiff-Appellant,*

(83-5847),

v.

RUBEN G. HICKS, Trustee, - - *Defendant-Appellee.*

Nos. 83-5846, 83-5847.

Argued Oct. 18, 1984.
Decided May 8, 1985.

Before: EDWARDS* and JONES, Circuit Judges, and WEICK, Senior Circuit Judge.

NATHANIEL R. JONES, Circuit Judge.

Appellants, Lola Gay Sloan, Tony Sloan, Lola Bettye Sloan, Ned Sloan, Jimmie Sloan, Margaret Sloan, Bruce Sloan (the Sloans) and John Sloan, appeal from the dis-

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*Honorable George Edwards took senior status January 15, 1985.

trict court's judgment, which affirmed the decision of the Bankruptcy Court. Upon consideration of the issues presented by this appeal, we affirm the Bankruptcy Court in part, reverse in part, and remand.

Becknell & Crace Coal Company, Incorporated (Becknell) entered into a "Lease-Purchase Agreement" with the appellants on January 22, 1970. After Becknell began mining coal on the land described in the Lease-Purchase Agreement, Becknell and the appellants amended the Lease-Purchase Agreement by entering into two other written agreements. On January 31, 1971, Becknell gave two promissory notes totaling $56,827.61 to satisfy its debt for royalties due in 1970 (Agreement of January 31, 1971). On August 2, 1971, Becknell gave security for a default in royalty payments and in return the appellants revoked a termination of the Lease-Purchase Agreement and scheduled deferred royalty payments (Agreement of August 2, 1971).

In May of 1972, Becknell filed a proceeding under Chapter XI of the Bankruptcy Act, 11 U.S.C. §§ 301-399. On August 12, 1972, the appellants filed a petition to direct rejection of the Lease-Purchase Agreement as an executory contract under 11 U.S.C. § 110. Subsequently, Becknell's Trustee, Ruben Hicks, filed an answer to the petition and asserted a fee simple interest in the real estate subject to a lien reserved for the payment of the balance of the purchase price. Then, the Trustee filed an application for an extension of time to reject or assume the executory contract and moved for an order allowing his entry onto the land for certain purposes. The Bankruptcy Court granted the motion for entry and denied as moot the petition for an extension.

After trial, the Bankruptcy Court filed its memorandum opinion. The court concluded that although the Lease-Purchase Agreement and its terms styled Becknell as a

lessee, Becknell had a fee simple interest in the unmined coal. The court further concluded that the Lease-Purchase Agreement was not an executory contract within the meaning of 11 U.S.C. § 110 merely because Becknell was obligated to pay royalties. Consequently, the court entered judgment in favor of the Trustee and thereby conveyed a fee simple in the coal to Becknell, a vendor's lien in the coal to appellants (to secure payment for the balance due on the purchase price), and a lien in the coal to Becknell's employees (to secure payment of their wages) pursuant to Ky. Rev. Stat. § 376.150.

On appeal, the District Court for the Eastern District of Kentucky found that the Lease-Purchase Agreement granted Becknell "an estate for years to the entire property in question subject to the limitation that it mine . . . according to the terms of the [Lease-Purchase Agreement] . . . *and* a contract right to mine and remove the coal underlying the surface." (emphasis in original) (brackets added). According to the district court, the Lease-Purchase Agreement did not give Becknell the type of contractual right subject to 11 U.S.C. § 110 because it was executory only as to Becknell's obligation to pay. The district court, therefore affirmed the decision of the Bankruptcy Court. John Sloan and the Sloans appealed.

[1] As the district court noted, this appeal turns on (1) whether the Lease-Purchase Agreement conveys as fee simple title to the coal or only a lease to mine the coal and (2) whether the Lease-Purchase Agreement is executory in nature. Our review of the Bankruptcy Court's findings employs the standards which the district court applied in its review. "[W]e examine the decision of the court from which the appeal is taken for error and the legal determinations of the district court as a reviewing tribunal are not shielded by a presumption of correctness." *Universal Min-*

erals, Inc. v. *C.A. Hughes & Company,* 669 F. 2d 98, 101-02 (3d Cir. 1981).

I. ESTATE GRANTED

[2] The contract that created Becknell's interest is denominated a "Lease-Purchase Agreement" and, therefore, is a hybrid agreement whose "legal effect, under Kentucky law, differs from that of a lease for the use of surface land only." *Godley* v. *Kentucky Resources Corp.,* 640 F. 2d 831, 835 (6th Cir. 1981). Regardless of the agreement's denomination and hybrid characteristic, under Kentucky law "what is commonly termed a coal mining lease is regarded as the conveyance of an estate or interest in the minerals as land unless the terms of the instrument require a different construction." *Johnson* v. *Coleman,* 288 S. W. 2d 348, 349 (Ky. 1956). The district court concluded that the terms of the Lease-Purchase Agreement granted Becknell two interests: an estate for years subject to the limitation that it mine according to the Lease-Purchase Agreement and a contract right to mine and remove the coal.

John Sloan contends that the terms of the Lease-Purchase Agreement granted Becknell a fee simple title in the coal subject to a condition precedent that Becknell mine over 3,000,000 tons of coal. John Sloan further contends that because Becknell failed to perform that condition precedent Becknell never received a fee simple title to the coal.

The Sloans contend that the terms of the Lease-Purchase Agreement granted Becknell a lease rather than a fee simple absolute right or fee simple conditional for several reasons. First, Becknell did not have an absolute right to permanently dispose of the property. Second, the Lease-Purchase Agreement's granting provisions gave the Sloans a right of reversion. Third, there exists no employees' lien.

The Trustee contends that the terms of the Lease-Purchase Agreement gave Becknell a fee simple for four reasons. First, the Lease Purchase Agreement used the magic words of grant that create a fee simple. Second, Becknell paid a substantial downpayment of $100,000 and was to pay the balance of $900,000 through royalties. Third, Becknell had the right to mine coal until the coal's exhaustion. Fourth, to an employees' lien under Ky. Rev. Stat. § 376.150.

[3] We believe that the terms of the Lease-Purchase Agreement granted Becknell a fee simple interest in the coal. The operable terms of the agreement support our conclusion. For example, the Lease-Purchase Agreement purported to "bargain, sell, transfer, convey and lease unto . . . [Becknell and] its successors and assigns all the minable and merchantable coal in, under, and/or upon . . ." certain property. The Lease-Purchase Agreement further provided that:

> When One Million Dollars, ($1,000,000.00), not including wheelage fees, has been paid to the party of the first part; party of the second part [Becknell] shall be and become owner in *fee simple of all coal* remaining on these premises.

(brackets and emphasis added).

We believe further that Becknell's fee simple interest in the coal was not disturbed by either of the amendments to the Lease-Purchase Agreement. Instead, through the Agreement of January 31, 1971, Becknell gave two promissory notes in lieu of a cash payment. Through the Agreement of August 2, 1971, Becknell partially paid for its default in royalties, scheduled deferred payments for that default, assigned the proceeds from its future sales of coal, and gave an option to immediately terminate the Lease-

Purchase Agreement in lieu of a presently exercisable option to terminate the Lease-Purchase Agreement and a presently exercisable demand on one of the two promissory notes.

II. EXECUTORY NATURE OF INTEREST

[4] The district court concluded that Becknell's contract right was not subject to 11 U.S.C. § 110 because it was not executory. John Sloan contends that the Lease-Purchase Agreement granted to Becknell a fee simple interest in the coal subject to a condition precedent—the mining of over 3,000,000 tons of coal. Because conditions precedent, according to John Sloan, are "universally described by the authorities as that the Lease-Purchase Agreement was executory.

The Sloans contend that the Lease-Purchase Agreement constituted an executory contract subject to the provisions of 11 U.S.C. § 110 because both Becknell and the Sloans were obligated to perform certain acts in the future. In support of that contention the Sloans identified a whole range of specific obligations that were to be performed by Becknell including a promise to pay the balance.

The Trustee contends that the Lease-Purchase Agreement was not executory for five reasons. First, the appellants had fully performed their obligations. Second, the only obligation that is not fully performed is Becknell's obligation to pay the balance. Third, that unperformed obligation to pay the balance does not create an executory contract that must be accepted or rejected. Fourth, the appellants' future obligations as listed by the Sloans are "actually rights consistent with their continued ownership of the surface and rights to monitor the method of accounting for amounts of coal removed which relate to payment for the coal." Fifth, the Lease-Purchase Agreement

was subject to an employees' lien under Ky. Rev. Stat. § 376.150.

We believe that this contract is executory. This Court has stated that:

> The key, it seems, to deciphering the meaning of the executory contract rejection provisions, is to work backward, proceeding from an examination of the purposes rejection is expected to accomplish. If those objectives have already been accomplished, or if they can't be accomplished through rejection, then the contract is not executory within the meaning of the Bankruptcy Act.
>
> . . . .
>
> *Thus, executory contracts involve obligations which continue into the future.* S.Rep. No. 94-458, 94th Congress, 1st Sess. (1975). *They include leases, employment contracts and agreements to buy or sell in the future.* Generally, they are agreements which include an obligation for the debtor to do something in the future.

In Re Jolly, 574 F. 2d 349, 350-51 (6th Cir.) (empahsis added), *cert. denied*, 439 U. S. 929, 99 S. Ct. 316, 58 L. Ed. 2d 322 (1978). John Sloan, the Sloans, and Becknell had obligations to perform in the future. As a result, the Lease-Purchase Agreement was executory.

Because the Lease-Purchase Agreement was executory the Trustee should have been given the opportunity to assume or reject the contract. *See* 11 U.S.C. § 110. In the Bankruptcy proceedings the Trustee filed a petition for an extension of time to reject or assume the contract. The Bankruptcy Court, however, denied that petition as moot because it determined that the Lease-Purchase Agreement was not executory. The Trustee, therefore, did not

have an opportunity to assume or reject the Lease-Purchase Agreement.

We, therefore, AFFIRM, in part, REVERSE, in part, and REMAND. We also deny appellee's previously-refused motion for bond increase. We note that our decision does not alter the provisions of the contract. As a result, Becknell must leave in place 300-foot blocks of coal at 1500-foot intervals. These blocks of coal as well as the surface rights were specifically reserved by the appellants.

APPENDIX 3

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
LONDON

In Bankruptcy
No. 72-650

IN RE
BECKNELL & CRACE COAL COMPANY, INC., BANKRUPT

LOLA GAY SLOAN, ET. AL. - - - - *Plaintiffs*

v.

RUBEN G. HICKS, Trustee - - - - *Defendant*

JUDGMENT—Filed March 25, 1982

In accordance with the Memorandum of even date, it is ORDERED AND ADJUDGED that the decision of the Bankruptcy Court below be and is affirmed.

This 25th day of March, 1982.

(s) Eugene E. Siler, Jr., Judge

IN THE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT LONDON

In Bankruptcy
No. 72-650

IN RE
BECKNELL & CRACE COAL COMPANY, INC., BANKRUPT

LOLA GAY SLOAN, ET. AL. - - - - *Plaintiffs*

v.

RUBEN G. HICKS, Trustee - - - - *Defendant*

MEMORANDUM—Filed March 25, 1982

This case involves an appeal from a determination by Bankruptcy Judge Lee. Since the bankruptcy petition was filed before the effective date of the 1978 bankruptcy law revisions, it is to be decided in accordance with the pre-revision law.

FACTS

The appellants are the owners of real estate which appears to contain valuable coal deposits. They entered into a "Lease Purchase Agreement" with the bankrupt under the terms of which the bankrupt was to mine this coal. The principal point of contention in this case is whether the agreement should be categorized as a sale of an interest in this coal or merely a lease of real property.

Upon the filing of the bankruptcy petition, a trustee was appointed. Pursuant to § 70(b) of the old Bankruptcy Act, 11 U.S.C. § 110(b), the trustee must promptly act to accept any outstanding executory contracts or they are deemed to have been rejected by operation of law. In this case, the trustee moved the Bankruptcy Court for an extension of time in which to accept or reject the contract in issue, but the Bankruptcy Court declared the motion to be moot, as it decided the contract was not executory.

The trustee contended that agreement was not a lease contract (executory in nature) but actually a conveyance in fee simple of the coal underlying the land. The Bankruptcy Court accepted this argument and held for the trustee.

APPELLANT'S ARGUMENT

It is the position of the appellants that the agreement was a lease in the form of an executory contract when the petition for bankruptcy was filed. Since the trustee did not timely accept it, they contend he no longer has any interest under the argument.

Counsel for the appellants has set forth a very persuasive argument in support of their position. The following is a summary of what this Court feels to be the major points of contention raised by the appellants in support of their argument that the Bankruptcy Court has failed to take into account many important factual considerations in arriving at its decision.

1. Testimony of Dr. Becknell (President and Director of the bankrupt) was ignored by the Court in its finding that the instrument in question was not an executory contract.

2. The fact that the agreement was carried on the books of the bankrupt as a lease and was referred to as such throughout the agreement.

3. Various duties of future performances by both the lessor and lessee were ignored by the Court.

4. The requirement that 3,000,000 tons of coal were to be mined over a period of ten years before any right to mine the remaining coal would be granted to the bankrupt.

FINDINGS AND CONCLUSIONS OF THE BANKRUPTCY COURT

In order to determine whether the appellants' argument is meritorious, it will be necessary to examine more closely the holding of the Bankruptcy Court. The trustee below argued that the agreement in issue amounted to a deed to the coal underlying the land owned by the appellants. In accepting this argument, the Bankruptcy Court appears to have considered all the evidence presented to it. The testimony of Dr. Becknell appears to have been given a good deal of consideration. However, the Court chose to reject such testimony. It stated:

> The trustee in bankruptcy is not bound by the sworn statements of Dr. Becknell, a physician, as to the nature of the agreement between Becknell & Crace Coal Company, Inc. and the plaintiffs. The nature of the contract is a question of law to be determined by the court. In any event, the sworn statements of Dr. Becknell appearing in the Statement of Affairs and Statement of Executory Contracts accompanying the Chapter XI petition are not at variance with his testimony under oath, and such evidence, even if admitted, would be merely cumulative in nature.

The Bankruptcy Court took into consideration various other aspects of the lease upon which the appellants rely in support of their argument. The Court considered the 30 year lease provision and chose to reject the appellants' argument on that point. Instead, the Bankruptcy Court

found the agreement, when considered as a whole, conferred upon the bankrupt the right to mine coal in perpetuity and not for a term of years. Another provision of the lease provided as follows:

> Upon the resumption of the mining and removal of coal in excess of three million tons, party of the second part shall have complete ownership and clear title to any coal remaining and the free rights to mine same. As it is part of this lease purchase agreement that upon receipt of One Million Dollars ($1,000,000.00), Nine Hundred Thousand Dollars ($900,000.00), royalty and the initial One Hundred Thousand Dollars, ($100,-000.00), payment, the first party grants complete ownership of the coal and coal mining rights to the second party.

The Court chose to construe such language to be inconsistent with the words of present demise appearing at the beginning of the agreement. The Court viewed this inconsistency as an "inartfully expressed vendor's lien."

The Court made the following conclusions:

> To a great many people who do not live in the coal counties, an instrument having the usual terms and attributes of a lease would seem to be a lease. Nevertheless, there is a substantial body of law to the effect that the grant of the right to mine coal in the land of the lessor, and to remove the coal therefrom, although the instrument may be called a "lease," is a grant of an interest in the land itself, and not a mere license to take coal. . . . It is nonetheless a sale if the parties called a deed a "lease" and styled themselves "lessor and lessee," and contracted that in case of nonpayment of the "royalty" the grantor should have the right of distress, or at his option the right to forfeit the grant.

School Dist., etc. v. *City of Philadelphia,* 79 A. 2d 433, 436 (1951). The Bankruptcy Court went on to state,

> Whether a lease such as the instant one is merely a lease of the land with the privilege of removing minerals during a certain period, or is in reality a sale of land, is a question which is largely determined by the facts of each individual case and which is answered differently in different jurisdiction.

Kennedy v. *Hicks,* 180 Ky. 562, 203 S. W. 318, 320 (1918). In support of its holding that the agreement was a sale of the coal interest in fee simple, the Bankruptcy Court found the case to be analogous to *Ramsey* v. *Yunker,* 311 Ky. 820, 226 S. W. 2d 14 (1950). In the *Ramsey* case, the Kentucky Court of Appeals held the instrument in question to be a deed to the minerals in place because it had all the earmarks of an outright conveyance.

The Court below further held:

> [T]he contract in question is not executory as claimed by the Sloans [appellants]. . . . The only thing that remains executory about this lease is the bankrupt's obligation to pay. Consequently, it is not the kind of contract which the trustee must be deemed to have rejected if he does not assume it within the time limits fixed by section 70(b) of the Bankruptcy Act, 11 U.S.C. § 110(b). *Stell Manufacturing Co.* v. *Gilbert,* 372 F. 2d 113, 115 (5th Cir. 1967); *In re Kosting,* 350 F. Supp. 1071 (D.C. Conn. 1972).
>
> A contract which is executory only in the sense that it provides the fully performed nonbankrupt with a claim against the estate is not one which must be assumed or rejected. Section 70(b) and related provisions of the Act are not concerned with claims provable against the estate under § 63a but with assets of the bankrupt which pass to the trustee under 70a.

ISSUES TO BE IDENTIFIED

The appellants recognize where there is conflicting testimony or questions of credibility, the trial court's findings are entitled to be given great weight and should be overturned only if found to be clearly erroneous. However, it is their position that the facts in the present case are undisputed and this Court is in as good a position as the Bankruptcy Court to construe the terms of the agreement; therefore, this Court should not be bound by the Bankruptcy Court's findings of fact and conclusions of law. This position appears to be well taken.

Rule 810 of the Bankruptcy Rules provides as follows:

> Upon an appeal the District Court may affirm, modify, or reverse a referee's judgment or order, or remand with instructions for further proceedings. The Court shall accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge the credibility of the witnesses. The rule defines the judge's authority in disposing of judgments, orders and findings on review in conformity with Section 2, sub. a(10) of the Act, 11 U.S.C. 11(a)(10), and requires the same effect to be given the referee's findings as Rule 52(a) of the Federal Rules of Civil Procedure accords to the findings of the trial court.

In re Dolnick, 375 F. Supp. 84 (N.D. Ill. 1974). However, this Court has previously held that where the facts are not in dispute, the reviewing court is free to examine the legal conclusions of the Bankruptcy Judge and to reject them if they are erroneous. *National Cash Register* v. *K.W.C., Inc.*, 432 F. Supp. 82 (E.D. Ky. 1977). This appears to be the situation presented to the Court in this appeal. As the Court below stated, "The nature of the contract is a question of law to be determined by the Court."

Therefore, the "clearly erroneous" standard should not be applied. Instead, this Court will freely examine the conclusions determined by the Bankruptcy Court below.

The conclusions are twofold. They are:

1. Whether the Lease Purchase Agreement, as written, conveys fee simple title to the coal deposits in issue or whether the agreement merely constitutes a lease to such property, and

2. Whether the agreement is executory in nature.

CONCLUSION

Since the agreement in question purports to affect title to Kentucky land, the law of Kentucky should be applied. *Belcher* v. *Elliott,* 312 F. 2d 245 (6th Cir. 1963). It is generally recognized under the law of Kentucky to be the duty of the courts to construe contracts so as to arrive at the intention of the parties as expressed in the instrument as a whole, considering the subject matter of the contract, the situation of the parties and the conditions under which the contract was written. *Lafevers* v. *Lafevers,* 255 S. W. 2d 985 (Ky. 1953). However, "an unambiguous instrument conveying property or specified property rights, must be construed according to its terms, not according to its creator's intent, and is in and of itself generally determinative of the nature and extent of a conveyance." *Godley* v. *Kentucky Resources Corp.,* 640 F. 2d 831, 835 (6th Cir. 1981), *citing Phelps* v. *Sledd,* 479 S. W. 2d 894 (Ky. 1972); *Inland Steel Co.* v. *Isaacs,* 291 S. W. 2d 522 (Ky. 1956); *Buchanan* v. *Watson,* 290 S. W. 2d 40 (Ky. 1956). In regard to this point, the court below found an ambiguity existed in that the contract in issue contained words of present demise which appeared inconsistent with the remainder of the agreement . The appellants dispute this and in their argument relating to this point have re-

ferred this Court to *Caldwell's Kentucky Form Book,* 3d Ed., Form 59.2 page 744 (entitled "Coal Lease"). The appellants appear to have patterned their agreement to conform with this model in several sections. This form contains words of present demise which the Court below found sufficient to constitute an ambiguity. While form books are not "legal authority" upon which this Court may rely for legal conclusion, compliance with such forms indicates the agreement does not contain the type of ambiguity which the Bankruptcy Court found to exist. This error is not crucial to the outcome of the present case; in fact, such a holding detracts from several major points of contention raised by the appellants in their briefs to this Court. Having found no ambiguity to exist on the face of the agreement in issue, this Court may determine the effect of the instrument without recourse to a trier of fact and without consideration of the intent of the parties. *Godley* v. *Kentucky Resources Corp., supra,* at 835.

In *Godley,* the Sixth Circuit was presented with interpretation of a lease agreement similar to that presently before this Court. In that case, the Court made the following statement regarding coal leases:

> While termed a "lease," the agreement between Piedmont and the Grahams is in fact a hybrid instrument. Its legal effect, under Kentucky law, differs from that of a lease for the use of surface land only. The "lease" not only gives the lessee the right to occupy the property for a term of fifteen years, but also incorporates an agreement to sell a portion of the realty. *Mills* v. *Mills,* 275 Ky. 431, 121 S. W. 2d 962 (1938). As consideration for the agreement, the lessee makes certain covenants and agrees to pay a fifty cent "royalty" on each ton of coal removed. In addition, the lessee promises to remove a minimum amount of coal each

> year of the lease, until such time as minable, merchantable coal is no longer to be found on the property in sufficient amount to meet the minimum requirements.

Id. at 835. Therefore, it is the conclusion of this Court that the bankrupt of this action was granted an estate for years to the entire property in question subject to the limitation that it mine the property according to the terms of the agreement in issue, *and* a contract right to mine and remove the coal underlying the surface. *See id.* at 836; *Head* v. *Little,* 312 Ky. 10, 226 S. W. 2d 322 (1950).

It is the contract right which may be subject to § 70b of the Bankruptcy Act. As to this issue, the Bankruptcy Court was correct in its determination that the agreement was not executory in nature. In a literal sense, "All contracts to a greater or less extent are executory. When they cease to be so, they cease to be contracts." 1 Williston, *Contracts* § 14 (3d Ed. 1957). However, applying such a definition to the situation presented to this Court would prove futile. In the bankruptcy context, "an executory contract has been defined as one in which a party binds himself to do or not do a particular thing, whereas an executed contract is one in which the object of the agreement is already performed." *In Re Rovine Corp.,* 5 B. R. 402, 404 (1980). Executory contracts generally include contracts on which performance remains due to some extent on both sides. *Id.* at 404. A contract so nearly performed by the nonbankruptcy party that failure to complete performance would not be sufficiently material to excuse performance by the bankruptcy should not be treated as an executory contract in bankruptcy. This appears to be the situation presented herein. The agreement is no longer executory within the meaning of the bankruptcy statute but is a partially executed contract, executory only as to the obligation of the bankrupt to pay. This is not the type of contractual situation to which § 70b is applicable and,

therefore, the holding of the Bankruptcy Court will be affirmed.

This 25th day of March, 1982.

(s) Eugene E. Siler, Jr.
Eugene E. Siler, Jr., Judge

APPENDIX 4

No. 86-5731

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IN RE:
TONY SLOAN,
LOLA BETTYE SLOAN,
NED T. SLOAN,
JIMMIE SLOAN,
MARGARET SLOAN, and
BRUCE SLOAN, - - - - - - - *Petitioners,*
JOHN A. SLOAN, - - - - - - - *Petitioner*

ORDER—Filed January 6, 1987

BEFORE: MERRITT and JONES, Circuit Judges and EDWARDS, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered by Order of the Court

(s) John Hehman
John P. Hehman, Clerk

APPENDIX 5

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF KENTUCKY
CORBIN

Case No. 72-00650

In Re:
BECKNELL & CRACE COAL CO., INC.
DEBTOR
RUBEN G. HICKS, TRUSTEE - - - - *Plaintiff*

v.

LOLA GAY SLOAN, ET. AL. - - - - *Defendants*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed June 11, 1986

This matter having come on before the court on March 19, 1986, for trial before the court and the plaintiff having appeared in person and by and through counsel and offered testimony in support of the complaint herein and the defendants having appeared herein and being represented by counsel, and having offered evidence in opposition to the plaintiff's complaint herein, and the court being fully informed, the court hereby makes the following findings of fact and conclusions of law in the within matter, to wit:

FINDINGS OF FACT

The court finds that the proposed Option to Lease agreement tendered by the trustee herein is in the best interests of creditors of the estate and that it is the best offer with respect to the sale of the trustee's interests in the Sloan tract that the trustee has received. The court

further finds that the proposed lessee, Greenwood Land & Mining Company, is an operating division of Shamrock Coal Company, Incorporated. Although the proposed Option to Lease agreement is with Greenwood Land & Mining Co., the evidence demonstrates that Shamrock Coal Company, Incorporated will be the lessee under the instrument and the trustee moved at the trial that the pleadings be amended to conform to the evidence and the court directed that a written motion be filed in that regard and by separate order the court has sustained the motion.

CONCLUSIONS OF LAW

The court finds that the issue raised by the defendants herein, with respect to termination of the Lease Purchase agreement prior to the filing of the petition of the debtor for relief under the Bankruptcy Act is *res judicata,* since this issue was necessarily a part of the litigation before this court which was appealed and ruled upon by the United States Court of Appeals for the Sixth Circuit.

The court further finds that, although that issue is *res judicata,* there was no proof of a written notice of default pursuant to the terms of the Lease Purchase agreement as amended, that there was no showing that the employee of Becknell Crace Coal Co., Inc., the debtor herein, to whom the oral notice of termination was given was an officer of the debtor and the court further holds that the act of Tony Sloan, one of the defendants herein, of giving oral notice of termination of the Lease Purchase agreement was not effective as to the other Sloans since there were multiple lessors to the Lease Purchase agreement and one party to such an agreement may not give notice of termination on behalf of the other parties.

The court further finds that the trustee filed a timely motion for extension of time to assume or reject the Lease Purchase agreement as an executory contract and that,

pursuant to the terms of the opinion of the United States Court of Appeals for the Sixth Circuit, the trustee is entitled to have that motion sustained and to have an opportunity to assume or reject the contract to the extent that it is executory under the terms of the opinion of the Sixth Circuit Court of Appeals.

The court further finds that, pursuant to the terms of the Lease Purchase agreement, as amended, the trustee, or his agents, and in this case, Shamrock Coal Company, Incorporated and its agents may enter onto the premises to conduct exploration on the premises and to prospect for coal pursuant to the terms of the Option to Lease agreement presented to the court in this action.

Dated: June 11, 1986

By the court —

(s) Joe Lee
Judge

APPENDIX 6

JUDGMENT—Filed June 11, 1986

In conformity with the Findings of Fact and Conclusions of Law this day entered, it is ORDERED AND ADJUDGED as follows:

1. That the trustee be, and hereby is, authorized and directed to enter into the Option to Lease agreement, in accordance with the pleadings filed by the trustee herein.

2. That the motion of the trustee to extend the time to assume or reject the Lease Purchase agreement, to the extent that it is executory, be and it is hereby sustained and the trustee shall have 100 days from and after the day after this judgment shall have become final and no further appeal from it being possible.

3. That the trustee, his agents, and the agents of the lessee under the terms of the Option to Lease agreement, may enter into the premises and conduct exploration and prospecting on the premises pursuant to the terms of the order and the 90 day period of the Option to Lease shall begin to run upon the date of entry of this order.

Dated: June 11, 1986

By the court —

(s) Joe Lee
Judge

APPENDIX 7

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF KENTUCKY
AT LONDON

No. 72-650

In Re

BECKNELL & CRACE COAL CO., INC.
DEBTOR
RUBEN G. HICKS, TRUSTEE - - - - - *Plaintiff*

v.

LOLA GAY SLOAN, Et Al. - - - - - *Defendants*

A. P. No. 14

ORDER GRANTING TEMPORARY RESTRAINING ORDER—Filed June 16, 1986

Upon the Motion of the Plaintiff herein and the Affidavit attached thereto, and it clearly appearing from said Complaint and Affidavit that, unless the Defendants herein are temporarily stayed and enjoined from proceeding in the Clinton Circuit Court with further civil actions in this matter, that the Plaintiff will be damaged by the interference with enjoinment by the Plaintiff of the property of the estate herein and that the failure to enjoin such activity would result in irreparable injury and harm to the Plaintiff in that it is sought to enjoin Shamrock Coal Company from proceeding in accordance with the orders of this Court to explore for minerals on the Sloan tract of land pursuant to the terms of the Option to Lease agreement approved by this Court, and such showing immediate,

irreparable injury, loss or damage will result to the Plaintiff and the creditors herein; that such temporary restraining order should be issued; and that no bond is required of the Trustee pursuant to the Bankruptcy Rule; it is

ORDERED that a hearing to determine whether or not to grant a preliminary injunction shall be held before the undersigned Bankruptcy Judge in the Bankruptcy Courtroom, Merrill Lynch Building, 100 East Vine Street, Lexington, Kentucky, pursuant to notice previously given on June 18, 1986 at the hour of 4:30 p.m.; and it is further

ORDERED that unless otherwise ordered by this Court, Defendants, Tony Sloan, Lola Bettye Sloan, Ned Sloan, Jimmie Sloan, Margaret Sloan and Bruce R. Sloan, their agents, attorneys, employees and successors and each of them be, and the same hereby are temporarily restrained from proceeding with any action in the Clinton Circuit Court with respect to the property which is the subject of the within adversary proceeding, and specifically with Civil Action 86-CI-080 or in any other way interfering with the actions of the Trustee or Shamrock Coal Company, their agents, attorneys, employees and successors with respect to the aforesaid property.

Entered this 16 day of June at 5:57 p.m., 1986.

By the Court:

(s) Joe Lee
Bankruptcy Judge

APPENDIX 8

ORDER GRANTING PRELIMINARY INJUNCTION

This matter having come on for hearing on the 18th day of June, 1986, pursuant to the motion of the Plaintiff

herein, Ruben G. Hicks, Trustee, requesting a preliminary injunction enjoining the Defendants from terminating the Lease Purchase Agreement or taking any action to or in any manner interfering with the Trustee in proceeding to enter into an option with Shamrock Coal Company and allowing Shamrock Coal onto the property which is the subject of this action to explore for coal pursuant to the orders issued by this Court from the bench on May 19, 1986 and Judgment entered herein on June 11, 1986 and to further enjoin any action in state courts which interfere with the use of this property by the Trustee and others pursuant to orders of this Court. The Plaintiff appeared by its counsel and the Defendants appeared by counsel and the Court, after consideration of the evidence presented at the hearing, finds that a preliminary injunction should be issued herein and that no bond is required of the Trustee to the Bankruptcy Rules, and accordingly, it is

ORDERED that the Defendants, their agents, attorneys, employees and successors and each of them be, and the same hereby are restrained and enjoined from taking any action to or in any manner terminating the Lease Purchase Agreement dated January 22, 1970 between the Defendants and Becknell & Crace Coal Company, Inc. except as authorized by this Court and from interfering with the Trustee, his agents, assigns, attorneys or Shamrock Coal Company, its agents, assigns or attorneys in proceeding to go on to the property which is the subject of this action and explore it for coal pursuant to the terms of the Option to Lease agreement approved by this Court on May 19, 1986 and Judgment entered June 11, 1986 and from proceeding in the Clinton Circuit Court with that certain action pending there against Shamrock Coal Company and others, being Civil Action No. 86-CI-080, or any other action in any Kentucky court to enjoin or otherwise interfere with the use of the property by the Trustee and Shamrock Coal Com-

pany or in any other manner attempting to interfere with or defeat the exploration of such property under the terms of the orders of this Court.

Entered this 18th day of June, 1986 at _____ __.m.

(s) Joe Lee
Bankruptcy Judge

APPENDIX 9

28 U.S.C. § 1651 WRITS

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102.

APPENDIX 10

TITLE 11 BANKRUPTCY

11 U.S.C. § 110b

(b) The trustee shall assume or reject an executory contract, including an unexpired lease or real property, within sixty days after the adjudication trustee, whichever is later, but the court may for cause shown extend or reduce the time. Any such contract or lease not assumed or rejected within that time shall be deemed to be rejected. If a trustee is not appointed, any such contract or lease

shall be deemed to be rejected within thirty days after the date of the order directing that a trustee be not appointed. A trustee shall file, within sixty days after adjudication or within thirty days after he has qualified, whichever is later, unless the court for cause shown extends or reduces the time, a statement under oath showing which, if any, of the contracts of the bankruptcy are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee. Unless a lease of real property expressly otherwise provides, a rejection of the lease or of any covenant therein by the trustee of the lessor does not deprive the lessee of his estate. A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same is enforceible. A trustee who elects to assume a contract or lease of the bankrupt and who subsequently, with the approval of the court and upon such terms and conditions as the court may fix after hearing upon notice to the other party to the contract or lease, assigns the contract or lease to a third person, is not liable for breaches occurring after the assignment.

APPENDIX 11

28 U.S.C. § 144

§ 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal

bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

APPENDIX 12

28 U.S.C. § 455 (a)

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

APPENDIX 13

SUPREME COURT OF THE UNITED STATES

Order of April 24, 1973

ORDERED:

1. That the rules and forms as approved by the Judicial Conference of the United States, to be known as the Bankruptcy Rules and Official Bankruptcy Forms, be, and they hereby are, prescribed pursuant to Section 2075, Title 28, United States Code, to govern the forms of process, writs, pleadings, and motions, and the practice and procedure under the Bankruptcy Act, in the proceedings and to the extent set forth therein, in the United States district courts, the District Court for the District of the Canal one, and the District Courts of Guam and the Virgin Islands.

2. That the aforementioned Bankruptcy Rules and Official Bankruptcy Forms shall take effect on October 1, 1973, and shall be applicable to proceedings then pending, except to the extent that in the opinion of the court their application in a particular proceeding then pending would not be feasible or would work injustice, in which event the former procedure applies.

3. That General Orders in Bankruptcy 1 to 7 inclusive, 9 to 12 inclusive, 14 to 26 inclusive, 28 to 40 inclusive, 42 to 45 inclusive, 47, 50, 51, 53, and 56 and Official Forms in Bankruptcy 1 to 13 inclusive, 15 to 20 inclusive, 22 to 47 inclusive, and 70 to 72 inclusive, heretofore prescribed by this Court, be, and they hereby are, abrogated, effective October 1, 1973.

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit the said new Bankruptcy Rules and Official Bankruptcy Forms to the Congress at its present session on or before the first day of May, 1973.

APPENDIX 14

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 86-5731

IN RE:

TONY SLOAN,
LOLA BETTYE SLOAN,
NED T. SLOAN,
JIMMIE SLOAN,
MARGARET SLOAN, and
BRUCE SLOAN
JOHN A. SLOAN, pro se - - - - *Petitioners*

PETITION FOR WRIT OF MANDAMUS

TO: THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners respectfully show:

1. The Petitioners, Tony Sloan, et al., and the Petitioner, John A. Sloan, pro se, jointly filing this petition, will hereinafter be called Petitioners. All of Petitioners are residents of Clinton County, Kentucky and owners of the land involved in this action.

2. The Respondent herein is the Honorable Joe Lee, Bankruptcy Judge for the Eastern District of Kentucky, and who has been sitting as Bankruptcy Judge in this action for the past fourteen (14) years, since its inception in May of 1972. Judge Lee and the Bankruptcy Court for the Eastern District of Kentucky will be referred to hereafter as "Respondent."

3. The only other party to this action and to the action below is Ruben G. Hicks, Trustee, who was appointed Trustee in Bankruptcy for Becknell and Crace Coal Company thirteen and one-half (13½) years ago by the Honorable Joe Lee. Pursuant to Federal Rules of Appellate Procedure 21(b), the Trustee will be deemed a Respondent for all purposes. However, references to "Respondent" herein shall mean the Honorable Joe Lee and references to the Trustee shall be by "Trustee."

4. The facts and circumstances on which the Petitioners claim entitlement to relief are as follows:

PART I—STATEMENT OF FACTS

A. Judgment, Opinion and Mandate of this Court.

This Court entered its Judgment, constituting its mandate, on May 8, 1985. Petition for Rehearing was denied July 11, 1985. Certiorari to the Supreme Court was denied January, 1986. The Judgment of this Court is set forth in 761 F. 2d 319. The case numbers of this Court on appeal were: 83-5846 and 83-5847 (*Exhibit 1*).

The most clear-cut and emphatic holdings of the mandate, about which there could be no dispute, are as follows:

> "As a result, the Lease Purchase Contract was executory."
>
> "We note that our decision does not alter the terms of the contract."
>
> "These blocks of coal as well as the surface rights were specifically reserved by the appellants."
>
> "Through the agreement of August 2, 1971, Becknell . . . . gave an option to immediately terminate the Lease Purchase Agreement in lieu of a presently exerciseable option . . . ."

Two holdings of the mandate are not completely clear and unequivocal. They are:

"[3] We believe that the terms of the Lease-Purchase Agreement granted Becknell a fee simple interest in the coal. The operable terms of the agreement support our conclusion. For example, the Lease-Purchase Agreement purported to "bargain, sell, transfer, convey and lease unto . . . [Becknell and] its successors and assigns all the minable and merchantable coal in, under and/or upon . . ." certain property. The Lease-Purchase Agreement further provided that:

When One Million Dollars ($1,000,000.00), not including wheelage fees, has been paid to the party of the first part; party of the second part [Becknell] shall be and become owner in fee simple of all coal remaining on these premises. (Brackets and emphasis added).

and

"Because the Lease-Purchase Agreement was executory the Trustee should have been given the opportunity to assume or reject the contract. See 11 U.S.C. Section 110. In the Bankruptcy proceedings the Trustee filed a petition for an extension of time to reject or assume the contract. The Bankruptcy Court, however, denied that petition as moot because it determined that the Lease-Purchase Agreement was not executory. The Trustee, therefore, did not have an opportunity to assume or reject the Lease-Purchase Agreement."

Careful examination of the Sixth Circuit Judgment reveals that it does not grant any interest or title whatsoever *to the Trustee.* (emphasis added)

It seems that the Court holds that Becknell was granted a fee simple interest only if he performed the conditions of the contract. Otherwise, the Court would not have quoted one of the qualifying conditions precedent (set out above) to obtaining a fee simple interest in the remaining coal.

(Since Judge Jones had before him the entire contract, which required mining of 3,000,000 tons over 10 years, in addition to payment of $1,000,000.00 and wheelage fees, and contained express cancellation provisions, and which contract terms, he said, are not altered, we believe that his language set out in the opinion cannot mean that Becknell was granted a fee simple interest, in praesenti, without complying with the conditions precedent.)

The second holding of the Court, which can be debated as to meaning, does not say that the Trustee can be given any further time to assume the contract contrary to the express prohibition of 11 U.S.C. Section 110(b), Bankruptcy Rule 607 and 906. The first sentence, in part ". . . . should have been given the opportunity to assume . . . .", could be interpreted to mean approval of the fact that the Trustee had and was given ample opportunity to assume the contract. The statutory time limit had given him that opportunity.

In this case, since he was appointed as Receiver, who acts as the Trustee, on September 15, 1972, and Trustee, on October 12, 1972, he actually and practically had almost three (3) months (September 15-December 12, 1972), to assume the contract. This paragraph of the mandate certainly does not authorize the Respondent to grant a further extension of time after thirteen and one-half (13½) years in violation of 11 U.S.C. Section 110(b), Bankruptcy Rule 607 and 906. *Yet, the Respondent entered Judgment on June 11, 1986, giving Trustee a further 100 days to assume the contract.* (emphasis added)

Thus, the broadest interpretation of the mandate would permit the Respondent to hold a hearing only to determine if the Trustee had assumed the contract or had an opportunity to do so within the statutory time limits. The hearing held on May 19 revealed that the Trustee had never moved the Court for assumption, or made any efforts to

renew his 1972 Motion for Extension, or taken any other action to perform any part of the contract, even to this date, thirteen and one-half (13½) years later.

B. Background and Proceedings Below, Before Appeal to This Court.

Petitioners and Becknell signed a Lease Purchase Agreement in January, 1970 (*Exhibit 2*), amended in August, 1971 (*Exhibit 3*). Performance of the contract ceased in late 1971 or early 1972. Thereafter, a Chapter 11 proceeding was filed in May, 1972, listing Petitioners' contract as a lease and as executory.

Petitioners filed a Petition for Rejection in August, 1972 (*Exhibit 4*), stating therein that the contract had been declared terminated, and seeking an order of rejection, which was required in the Chapter 11 proceedings under the old Bankruptcy Act. In September, 1972, the Chapter 11 proceeding was converted to a Chapter 7 proceeding. Ruben Hicks was appointed as Receiver in September and as Trustee in October, 1972. Mr. Hicks is an attorney, and was and is represented by able bankruptcy counsel. Both of them were aware of the opportunity for extension of time, and the limitation thereof in the statutes, as evidenced by their filing a Motion for Extension within the sixty (60) day time limit.

Petitioners responded to the Motion for Extension, that they would not object to a sixty (60) day extension (*Exhibit 5*) but no extension was ever granted at any time.

Trustee never assumed, or made any further motions to assume or reject from that day on. The Respondent held the Motion for Extension to be moot in his Judgment in 1976 (*Exhibit 6*), about three and one-half (3½) years after the Motion for Extension was filed. Respondent's Judgment awarded Trustee a fee simple title to the coal, and held the contract was not executory.

This judgment was appealed to the District Court, which affirmed the Respondent subject to the District Court opinion (pertinent excerpts *Exhibits 7 and 8*). The District Court opinion held that the contract was not executory, but held that the bankrupt, Becknell, *acquired only an estate for years in the land* (an estate for years is a lease) *subject to mining in accordance with the terms of the contract.*

(emphasis added)

Because Petitioners felt that the contract was absolutely and most emphatically an executory contract, in which the Trustee could obtain no interest because of failure to assume, they appealed the Judgment of the District Court to the Sixth Circuit.

C. Proceedings Below, After Appeal and After Mandate of the Sixth Circuit.

Shortly after Notice of Appeal to this Court, Trustee filed an "Adversary Proceeding" before Respondent alleging ownership of Petitioners' coal to which Complaint Petitioners filed an Answer (*Exhibit 9 and 10*). The Adversary Proceeding was stayed by Order of the Sixth Circuit (*Exhibit 11*).

After the issuance of this Court's mandate, Respondent set the adversary proceeding for trial. Petitioners objected and moved the Respondent to dismiss for lack of jurisdiction; to comply with the mandate; and to permit Petitioners to file a declaratory judgment suit in a state court (Petitioners' Motions, *Exhibit 12 and 13*).

Argument of these Motions on May 7, 1986 revealed rather conclusively that Respondent, and Trustee's counsel, substituted their own interpretation of the Sixth Circuit mandate, rather than obey its plain and literal language.

The Respondent recognized his duty to obey the mandate by saying:

> "Then the motion to comply with the mandate of the Court of Appeals, I'll certainly sustain that, to the extent that I understand it".

(Page 29, *Exhibit 14*). But when pressed to obey or recognize specific directions or holdings of the Sixth Circuit, Respondent would not do so. (Pages 31-38, *Exhibit 14*).

The Court then proceeded with a trial on May 19, 1986. During the course of the trial, it clearly appeared that Respondent had made up his mind that the coal belonged to the Trustee along with complete freedom to use the surface; that Trustee could contract with it as he chose; that Trustee should be permitted to enter an option contract granting use of the surface and removal of the coal, without ever having assumed the contract. It was clear that the Respondent had decided to ignore the termination rights in the contract and the Sixth Circuit mandate recognizing same; that he actively prevented direct answers from the Trustee, even to the extent of answering questions put to the Trustee himself. (*Transcript of trial, Exhibits 15A and 15B*).

Contrary to the Respondent's opinions expressed during the trial, and set out in a subsequent Findings of Fact, Conclusions of Law and Judgment, the uncontradicted evidence showed that the lease was terminated in April, 1972, prior to bankruptcy (Page 167-169, *Exhibit 15B*); that the Trustee never made any effort to assume the contracts from his appointment in 1972 to date (Page 41-48 and Page 74, *Exhibit 15A*); that Respondent found as a fact (Page 61, *Exhibit 15A*) that the proposed option contract would disturb Petitioners' lands with bulldozers and drills (contrary to the Sixth Circuit mandate reserving surface rights to Petitioners).

Since Respondent announced his intentions at the trial, before Petitioners put on their evidence, and after the conclusion of the evidence, Petitioners filed motions to find special facts, and to set aside and reconsider his bench rulings, pursuant to Bankruptcy Rule 7052 and 9023 (FRCP 52 and 59) (*Exhibit 16*).

Petitioners and their counsel, all of whom are reasonable, substantial, business and professional people, became convinced that Respondent was wholly and unreasonably partial to the Trustee; that regardless of any argument, law, evidence, or even the mandate of this Court, respondent felt that the Trustee owned or had interest in both the surface and the minerals without regard to statutory rejection requirements, contract requirements, termination rights granted by contract, case law permitting termination of executory contracts, and the mandate of this Court. Accordingly, Petitioners and John A. Sloan, pro se, both filed motions and affidavits for recusal on June 2 and June 5, 1986 (*Exhibits 17 and 18*). Ignoring the prohibition expressed in 28 U.S.C. 144, Respondent, after recusal motions and affidavits were filed, and without ruling on same, entered his Findings of Fact and Conclusions of Law and Judgment on June 11, 1986 (*Exhibits 19 and 20*).

When Petitioners discovered at the trial, and at the hearing on May 7 that Respondent would not recognize the termination of a contract by its terms, Petitioners wrote a letter to the bankrupt, Becknell, and to the Trustee, with a copy, and explanatory letter to Respondent, reiterating and reaffirming again that the contract rights of mining had been terminated. The explanatory letter to Respondent, accompanying this last Notice of Termination, referred the Respondent to three cases clearly holding that the right of termination could be exercised in an executory contract as against the Trustee, after bankruptcy (*Exhibits 21 and 22*).

The trial also revealed that the Trustee's proposed optionee, Shamrock Coal Company, had obtained, for at least two years prior to the hearing, a permit from the Kentucky Natural Resources and Environmental Cabinet to enter and explore for coal on Petitioners' lands (Page 125, *Exhibit 15A*).

Petitioners who had no notice or knowledge that such permit had been granted, until brought out at this trial, then obtained a copy of the application for said permit which had been filed with the Kentucky Cabinet. These copies revealed that the application made by Shamrock Coal Company falsely listed Becknell as the owner of both the surface and subsurface lands contrary to the requirements and the penal provisions of Kentucky Revised Statutes, Chapter 350 (which probably accounted for the fact that Petitioners had no notice of such application for permit being made or granted).

Petitioners promptly wrote the Kentucky Natural Resources Cabinet pursuant to KRS 350.250, and received their reply recommending a civil action to enforce the statute and regulations.

Suit was immediately filed in the Clinton County Circuit Court (the county where 90% of the land is located) naming as defendants only the Kentucky Cabinet of Natural Resources and Shamrock Mining Company the permittee, seeking to enforce the Kentucky statutes and regulations. Copies of all of these letters above-mentioned, the false application, the pertinent Kentucky statutes and regulations, and the Complaint filed in the Clinton Circuit Court are all set out as exhibits in the hearing held on June 18, on Trustee's Motion for Temporary Restraining Order and Motion for Preliminary Injunction, at the end of said transcript of hearing. (*Exhibit 23*) Both the Temporary Restraining Order and the Preliminary Injunction were granted by the Respondent

(*Exhibits 24 and 25*) over Petitioners' Motion to Dissolve (*Exhibit 25A*).

We call the Court's attention to the statements made by Respondent at the June 18 hearing to the affect that the Petitioners had chosen to drag this matter out over fourteen (14) years (Page 7 and 8, *Exhibit 23*), and that the Motions for Recusal came too late and were insufficient. The Respondent failed to mention that the Motions for Recusal came approximately a week before he entered any Orders as a result of the May 19 trial. Respondent also completely ignored his own record, of which he was fully aware, namely that Petitioners had filed every motion from 1972 to date, timely, within the short period of time permitted by the rules; that it was actually Respondent who took three and one-half (3½) years to render a decision on the Petition for Rejection; and another two and one-half (2½) years to rule on timely motions to set aside and find the actual facts under Federal Rules of Civil Procedure 52 and 59, Bankruptcy Rules 752 and 923.

These statements made by the Court in the face of his own personal knowledge that they were wrong, would cause any reasonable person to feel that the Respondent was prejudiced in favor of the Trustee and against the Petitioners.

On Page 9 of the hearing transcript of June 16, (*Exhibit 22*) Respondent indicated his prejudice again by stating that the Sloans were fighting for $4,000,000.00; that their interest is purely monetary, and that if he had a choice of fighting for $4,000,000.00 or settling for $800,000.00, the choice would be clear; that he didn't particularly view the Petitioners as "White Knights", or the other side either; that this is a suit about money.

Actually, these remarks of Respondent suggest that Respondent, indeed, is more interested in the Trustee

reaping $4,000,000.00 than he is in the contract rights and property rights and the mandatory rejection requirements of the statute, or in the terms of the mandate of the Sixth Circuit. It is quite clear from the record of this action since 1972, and Respondent has known continuously from then, that the Petitioners have never filed a Proof of Claim for money in this action; that they have sought only to regain the use of their property and enforce the provisions of the mandatory rejection requirements under the statute; that they had fought from 1972 until 1982, through two appeals to enforce their property rights and contract rights; that it was only until 1982 that the sum of $4,000,000.00 was mentioned by the Trustee in his Adversary Proceeding filed in November, 1982. Respondent knew when he made these remarks that there was not one iota of proof that Petitioners were interested in the $4,000,000.00 offer, or even knew about it until 1982.

On July 3, 1986, Respondent entered an Order overruling Petitioners Motion to Recuse. Petitioners received a copy of this Order on July 7, 1986 (*Exhibit 26*). We can only point out that Motions for Recusal were filed a week or more before the entry of Findings of Fact, Conclusions of Law and Judgment of the Respondent, and two weeks before his injunction was issued on June 18. His announcements from the bench concerning his intentions did not amount to an Order being entered, and these were immediately objected to by motion requesting specific findings, shown in the evidence, filed on June 2, 1986 (*Exhibit 16*) (which Respondent has never ruled on).

The second paragraph of Respondent's Order of July 3, 1986, states, inter alia, that the Court "had conducted a hearing in this matter on May 19 *on the request of the Trustee to assume the Lease-Purchase Agreement* with the Defendant Sloan". (emphasis added)

This statement is contrary to the record completely. The Adversary Proceeding Complaint (*Exhibit 9*) filed in 1982, and its subsequent amendments, never at any time contained a request to assume the contract. On the contrary, Trustee stated in these Complaints that he had been awarded title to the coal in the place. Assumption of the contract is not mentioned or requested therein.

It is ridiculous to accuse Petitioners of reading too much into the language of the Sixth Circuit to the affect "that our decision does not alter the provisions of the contract". Petitioners simply believe that if the Sixth Circuit holds that all the provisions of the contract are not altered, then we must expect the same treatment from the Respondent. He can no more alter the terms of the contract than the Sixth Circuit is willing to do.

We would point out further that his interpretation of this language to mean that a Trustee assumes an executory contract *cum onere,* quotes from 2 Collier on Bankruptcy, Paragraph 365.01(1) at 365-9 (15th Ed. 1986). We must point out that he failed to quote the last portion of that same sentence from Collier. The entire sentence reads:

> "If the Trustee, thus authorized by the Court, elected to assume a contract, he was required to take it *cum onere — that is, subject to all its provisions and conditions.*" (emphasis added)

Obviously, the cancellation provisions, the ten (10) year period for mining all the coal, and all the other conditions of the contract are binding.

Again, we point out, Respondent is knowledgeable and learned. He is versed in the Pre-Bankruptcy Code Law as well as the present Bankruptcy Code. He knew all of the requirements of the statute and yet he consistently refuses to recognize any statute, law or authority, or contract provisions which dictate that the Trustee has abso-

lutely no interest in the coal lands of the Petitioners. We suggest that this attitude demonstrates quite clearly a total lack of impartiality which justifies immediate enforcement of recusal by this Court.

We mention this simply to point out that any reasonable man knowing the relevant facts of this case would most certainly conclude that the Respondent was partial to the Trustee, and that he should disqualify himself and let another Judge preside over this case.

PART II—STATEMENT OF THE ISSUES AND OF THE RELIEF SOUGHT

The issues presented here are:

1. That Respondent is bound to follow the exact and literal language of this Court's mandate, such as,

A. That when this Court said its decision did not alter Petitioners' contracts, Respondent is bound to honor every term in the contract including the right of immediate termination specifically mentioned by this Court.

B. When this Court held that "surface rights were reserved by appellants" (Petitioners) Respondent could enter no Order affecting the surface rights, in which Trustee has absolutely no right.

C. That when this Court awarded a conditional fee simple interest to Becknell, it awarded the Trustee nothing.

2. That Respondent had no jurisdiction to hear Adversary Proceeding 14 when the Trustee had no interest in the subject matter (the coal), the Respondent having the duty to determine only if Trustee had sufficient opportunity to assume the contract.

3. That Respondent had the duty to recuse himself under 28 U.S.C. 455(a) and 28 U.S.C. 144.

4. That Respondent was prohibited from entering any Orders or taking any actions after the filing of the Affidavits for Recusal on June 5, 1986, pursuant to 28 U.S.C. 144, and that the Findings of Fact, Conclusions of Law and Judgment entered on June 11, 1986, and the Temporary Restraining Order and Preliminary Injunction entered on June 16 and June 18, respectively, are void in violation of said prohibition.

5. That Respondent had no jurisdiction to enjoin a suit brought against third parties, not parties to the bankruptcy proceeding at any time, the Kentucky Cabinet of Natural Resources and Shamrock Coal Company, which suit was brought to enforce penal provisions of Kentucky statutes in reference to surface mining.

The relief sought herein is:

1. A Writ of Mandamus compelling the Respondent to comply with the exact and literal language of the mandate, to honor the terms of the contract involved, including recognition of the termination rights of the parties, and the enforcement thereof.

2. A Writ of Mandamus compelling Respondent to dismiss Trustee's Adversary Proceeding 14 for the reasons that this Court awarded Trustee nothing, and Respondent has no juridsiction if Trustee has no interest.

3. That the Writ of Mandamus should compel Respondent to recuse himself.

4. That the Writ should set aside and void the Judgment and Orders entered by Respondent after the Recusal Affidavits were filed.

5. That the hearing held on May 19, 1986, having proved conclusively that the Trustee had ample opportunity to assume the contract, and had failed to do so, and which hearing was the only determination left to the juris-

diction of Respondent by this Court's mandate. Therefore, Respondent should be directed to entertain no further proceedings on behalf of the Trustee against the Petitioners herein.

PART III—REASONS WHY WRITS SHOULD BE GRANTED

The relief sought herein pursuant to 28 U.S.C. Section 1651 should be granted for the following reasons:

1. Respondent's rulings are a usurpation of the judicial power of Appellate Court by refusing to follow its mandate, and, also, a usurpation of congressional power by his holding that he is not bounnd by 11 U.S.C. Section 110(b), Bankruptcy Rules 607 and 906.

This writ should be issued by this Court in aid of its appellate jurisdiction to control the construction and application of its mandate. A request to the District Court, by appeal of Respondent's rulings, to further interpret this Court's mandate, would seem to be a vain and unnecessary act. Due to the unusual circumstances of this case, we believe it is proper that only this Court interpret its own mandate. We believe the language and intent of the following opinions support this conclusion and give this Court ample authority to issue the writ:

Schlagenhauf v. *Holder,* 379 U. S. 104, 13 L. Ed. 2d 152, 85 S. Ct. 234 (1964);

Roche v. *Evaporated Milk Association,* 319 U. S. 21, 87 L. Ed. 1185, 63 S. Ct. 938 (1943);

La Buy v. *Howes Leather Company,* 352 U. S. 249 1 L. Ed. 2d 290, 77 S. Ct. 309 (1957);

Will v. *United States,* 389 U. S. 90, 19 L. Ed. 2d 305, 88 S. Ct. 269 (1967).

In order to effectuate, or to prevent, the frustration of its mandate, and to issue writs appropriate to the proper exercise of its jurisdiction, this Court should issue its Writ of Mandamus. It has inherent power to construe its own mandate. *See Potomac Electric Power Co.* v. *Interstate Commerce Commission,* 702 F. 2d 1026 (D. C. 1983); *United States* v. *New York Telephone,* 434 U. S. 159 @ 172-173, 54 L. Ed. 2d 376 @ 389-391, 98 S. Ct. 364 @ 372 (1977).

2. The legal errors, conduct, and opinions of the Respondent, from the bench, after the mandate of this Court are flagrantly and egregiously a gross abuse of his discretion. Respondent has been a Bankruptcy Judge for twenty-five (25) years. He is an expert in bankruptcy law. He knows, and has been advised many times in this case by counsel, that this action was governed by the former Bankruptcy Act as required under Section 403(a) of the Bankruptcy Reform Act, Public Law, 95-598, 1978, 92 Stat. 2683. He knows and has long been aware that the former Bankruptcy Act as set out in 11 U.S.C. 110(b) and Bankruptcy Rules 607 and 906 compel the rejection of an executory contract unless the contract has been assumed within sixty (60) days, or *unless time for its assumption was extended, within that same sixty (60) days.* (Emphasis added) Yet, at the top of Page 129 (*Exhibit 23*) at the hearing of June 18, 1986, we find the following statement from the Court:

> Mr. Majors: Within 60 days or otherwise its deemed rejected.
>
> The Court: If he makes his application within that time. He made a timely application for an extension. *Under the old law, we didn't have the problem of whether the Court had to act on such an application within 60 days.* (Emphasis added)

The above exerpt is only one example. The entire record of Respondent's determination to ignore mandates

of the statutes and rules, to ignore direct and uncontradicted evidence of the ample opportunity of the Trustee to assume this contract, and to ignore this Court's own mandate, runs throughout the exhibits which are a part of this mandamus petition.

3. From an abundance of caution, Petitioners have filed a Notice of Appeal from the Judgment entered by Respondent on June 11, 1986, and a Notice of Appeal and Motion for Leave to Appeal pursuant to Bankruptcy Rule 8003 from the injunctions issued by Respondent on June 16 and June 18, 1986. However, the remedy of appeal is not adequate in this action.

By permitting the Trustee to contract with a third party alienating by option, Petitioners' property; to give permission to a third party to enter on the property and substantially disturb its surface, as if he owns the property, and to continue such trespass and disturbance even at the time this petition is being filed, constitutes wrongful acts contrary to this Court's mandate and beyond the jurisdiction of Respondent. Such action continues the irreparable injury to the Petitioners, sufficient to justify the unusual remedy of mandamus. Appeal processes cannot timely right these wrongs.

Respondent enjoined Petitioners from continuing an action filed in the State Court against the Kentucky Natural Resources Cabinet, and the proposed lessee of the Trustee, Shamrock Coal Company, which action was brought to enforce the Kentucky statutes and regulations concerning coal exploration and mining. The statutes provided for fines and imprisonment for violations thereof. The Complaint filed by Petitioners in the Clinton County, Kentucky Circuit Court, the correspondence and the statutes and regulations pertaining to same are a part of this petition for mandamus and set out at the end of *Exhibit 23*. We urge the Court to examine this exhibit carefully. To uphold

and continue this injunction issued by Respondent amounts to actually condoning a violation of the Kentucky statutes and regulations, which is outside Respondent's jurisdiction.

The appeal process cannot break the deadlock in which Respondent has placed Petitioners. This Court felt that mandamus was proper to break such a deadlock in the case of *Ohio Environmental Council* v. *U. S. District Court Southern District of Ohio,* 565 F. 2d 393 @ 398 (6th Cir. 1977). We believe that this petition and the exhibits show a clear abuse of discretion, which, as the Court said in *Ohio Environmental Council, supra,* makes the argument for appeal as a remedy irrelevant.

The period of almost six (6) years, 1972 through 1978, in which Respondent kept under submission Petitioners' rejection petition and motions to require him to follow the facts and the law; Respondent's continued refusal at this date to follow the Court's mandate; and his continued refusal to uphold the mandatory rejection statutes, almost fourteen (14) years after the filing of the Petition for Rejection by Petitioners in August, 1972; bear a striking resemblance to the continued intransigence of the District Court in the case of *Connor* v. *Coleman,* 440 U. S. 612, 59 L. Ed. 2d 619, 99 S. Ct. 1523. The language of Justice Marshall at the end of his dissenting opinion, which urged an immediate writ of mandamus to issue rather than the majority decision to take the writ under consideration for thirty (30) days, applies almost verbatim to the instant case. We quote from Justice Marshall's dissenting opinion:

> "I believe that the District Court's reliance on *Wise* v. *Lipscomb* is a transparent attempt to avoid the unequivocal command of this Court. Such intransigence, particularly after 13 years of malfeasance, warrants extraordinary sanctions. As we have previously held:
>
> "When a lower Federal Court refuses to give effect to, or misconstrues our mandate, its action may be

controlled by this Court, either upon a new appeal or by writ of mandamus . . . ."

"It is well understood that this Court has power to do all that is necessary to give effect to its judgments." *Baltimore and Ohio Co.* v. *United States,* 279 U. S. 781, 785, 73 L. Ed. 954, 49 S. Ct. 492 (1929).

Accord, *United States* v. *Haley,* 371 U. S. 18, 9 L. Ed. 2d 1, 83 S. Ct. 11 (1962).

The petition should be granted and mandamus should issue forthwith.

If we substitute in the above quote the word "Respondent" for "District Court," and the words "his own opinion" for the words *"Wise* v. *Lipscomb,"* the words of Justice Marshall fit our case precisely.

In the instant case, the Respondent has erred in believing that he was not foreclosed from granting a further extension of time to assume; and in granting Trustee use of Petitioners' surface and mineral; and in refusing to uphold all the terms of the contract. Respondent seems to have reinstated his own original judgment in the case, in which he granted Trustee title, and which was not upheld by either Judge Siler or this Court. To this extent, we believe the language of the Court in *United States* v. *Haley,* 371 U. S. 18, 9 L. Ed. 2d, 83 S. Ct. 11 (1962), is also quite appropriate, namely, that the District Court's error (Respondent here) should be rectified without delay.

4. The Respondent owes obedience to the mandate of the Court of Appeals and must carry it into effect according to its terms. The Respondent may neither add to, nor subtract from, the terms of the mandate. When further proceedings are specified in the mandate, the District Court is limited to holding such proceedings as are directed. These principles are set out in 1(b) *Moore Federal Practice,* Section 0.404(10), Page 169-174.

The language of the Court in *Hayes* v. *Thompson*, 637 F. 2d 483 (7th Cir. 1980), is appropriate to the instant case as follows:

> "Our holdings in Hayes 1 constitute the law of this case and are binding in further actions before bodies subject to our authority. Such bodies are without power to do anything which is contrary to either the letter or the spirit of the mandate construed in the light of the opinion. Thus, the District Court on remand was bound to follow in 'letter and in spirit' our enumerations of the law."

It would seem that enforcement of obedience to the mandate should not be left to the appeal process because of the impracticality and difficulty of determining exactly what was meant by the Sixth Circuit mandate. Petitioners have already been denied the use and enjoyment of their property for thirteen (13½) years. By reason of the Respondent's refusal to recognize the literal language of the mandate, their lands are now being subjected to substantial surface disturbance and possible deprivation and disturbance, of their property for several more years, while undergoing the appeal process. Only an immediate writ from this Court can prevent such an outrageous result of Respondent's actions, which we believe to be beyond his jurisdiction.

5. The writs should issue to compel Respondent to set aside all Orders entered by him from and after June 5, 1986, when the Motions and Affidavits for Recusal were filed. These Orders are: (1) his Findings of Facts and Conclusion of Law; and (2) Judgment, both entered on June 11, 1986, and (3) the Temporary Restraining Order, and (4) Preliminary Injunction of June 16 and June 18, respectively.

28 U.S.C. 144 reads, in part, as follows:

> "Whenever a party to any proceeding in a District Court makes and files a timely and sufficient Affidavit that the Judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, *such Judge shall proceed no further therein,* but another Judge shall be assigned to hear such proceeding." (emphasis added)

We believe this language, "shall proceed no further therein," is an absolute prohibition of the entry by Respondent of the Findings of Fact, Conclusions of Law, Temporary Restraining Order, and Preliminary Injunction entered after June 5, 1986.

The Affidavit of recusal of one party, the Sloans, by counsel, is insufficient because it was signed by counsel rather than a party, under Section 144. But, the Affidavit and Motion of John A. Sloan, pro se, a party, is certainly sufficient. The Motions and Affidavits were timely filed because they were filed shortly after Respondent's prejudicial conduct became evident at the trial, and before any Orders were entered thereafter, and both Affidavits are sufficient under 28 U.S.C. 455(a).

Respondent did not, and could not question the truth of the Affidavits. *Bell* v. *Chandler,* 569 F. 2d 556 (10th Cir. 1978); *U. S.* v. *Ridder,* 540 F. 2d 459 (10th Cir. 1976). In addition, both Affidavits for Recusal should be considered under 28 U.S.C. 455(a) and under the authority of this Court in *Roberts* v. *Bailor,* 625 F. 2d 125 (6th Cir. 1980).

Bailor, supra, held that even though Affidavits were filed under Section 144 and were insufficient thereunder, the District Judge had an independent duty to recuse himself; that Section 455(a) is a self-executing provision for disqualification of Federal Judges; that no particular proceeding is necsssary; and that the section sets forth a

mandatory guideline that Federal Judges must observe, *sua sponte.*

As Respondent has done with this Court's mandate, and with the mandatory provisions of the Bankruptcy statutes and rules, Respondent has ignored the requirements of 28 U.S.C. 144 and Section 455(a). He has certainly acted contrary to the principles set out by this Court in *Roberts* v. *Bailor, supra.*

5. As stated in 9 *Moore's Federal Practice,* Section 110.28, Page 306:

> "The jurisdiction of the Court of Appeals as that term is used in Section 1651 (28 U.S.C. Section 1651) must include the power of the Court of Appeals to insure that its District Courts are in fact Courts, and not schools of solipsism."

The continued refusal of Respondent to recognize the law of the case, the statutory mandates, the contract terms, the conclusive evidence adduced at the trial, and the literal language of this Court's mandate, by continuing to substitute his own version of the record, mandate, and law, certainly reflects a most solipsistic view point. Even more apparent, it is evidence of a great determination on Respondent's part to capture an illusive windfall, the Petitioners' coal. Any reasonable man, with knowledge of all the relevant facts, observing the Respondent's behavior, rulings and holding in this case, must conclude that he cannot act with impartiality in this case.

Again, we quote from 9 *Moore Federal Practice,* Section 110.13(10):

> There is general agreement that the refusal of a Judge to disqualify himself upon the filing by a party of an Affidavit of bias or prejudice pursuant to 28 U.S.C. Section 144 is not appealable. Review of the refusal

must await a final decision or other appealable order. A clear majority of the circuits agree, however, that refusal to disqualify is reviewable by mandamus, and although Courts of Appeal insist that review by mandamus may be had only in exceptional cases, it appears to be granted rather commonly in this area, perhaps for the reasons cited by Chief Judge Aldridge in *In Re: Union Leader Corporation,* 292 F. 2d 381 (Ca. 1st 1961), in part:

"From the general standpoint of the interest of justice, the right to be tried before an unbiased Judge is also basic in our judicial system," and, citing from *Green* v. *Murphy* (3rd Cir. 1958) 259 F. 2d 591, "public confidence in the Courts may require that such a question be disposed of at the earliest opportunity."

We urge that the writ of mandamus should be issued at the earliest possible moment to dispose of the question of Respondent's disqualification. As this Court of Appeals said in the case of *Knapp* v. *Kinsey,* 235 F. 2d 129 (6th Cir. 1956), quoting from the headnote:

"Where claimed bias or prejudice of Judge is not disclosed during trial, the remedy cannot be by change of Judges during trial, but becomes a matter of correction by Court of Appeals. 28 U.S.C. Section 144"

In this case, we urge that in view of the continuing injunctions, and the wrongful and continuing entry and trespass on Petitioners' lands, that the proper remedy here is by mandamus.

PART IV—COPIES OF ORDERS, OPINIONS, OR PARTS OF THE RECORD ESSENTIAL TO AN UNDERSTANDING OF THE MATTERS SET FORTH IN THIS PETITION

In accordance with the requirements of Federal Rule of Appellate Procedure 21, Petitioners have included in this part all of the exhibits which Petitioners feel are necessary to an understanding of the matters set forth hereinabove. Petitioners apologize for the volume of material included as an exhibit with this petition. We trust that the Court will agree that this was necessary to present the total picture of abuse of discretion by Respondent, and the issues on the merits. We trust this Court will find no fault on the part of Petitioners in preparing and presenting these Exhibits. The pleadings, motions and transcripts of hearings are indicative of Respondent's continued tendency to ignore the facts and the law.

The exhibits referred to hereinabove, in numerical order, are set out and made a part of this Petition, in accordance with the following index of exhibits:

INDEX TO EXHIBITS

1. Mandate, Judgment/Opinion of the United States Court of Appeals for the Sixth Circuit (1985).
2. Lease-Purchase Agreement (1970).
3. Amendment to Lease-Purchase Agreement (1971).
4. Petition to Direct Rejection of Executory Contract (1972).
5. Response to Petition of Trustee for Extension of Time to Assume (1972).
6. Judgment of Respondent Judge Joe Lee (1976).
7. Excerpt: Holdings of Judge Siler on Appeal from Bankruptcy Court (1982).

8. Judgment of Judge Siler affirming subject to his Memorandum Opinion (1982).

9. Complaint in Adversary Proceeding No. 14 (1982).

10. Answer to Complaint of Adversary Proceeding No. 14 (1982).

11. Order of the Sixth Circuit Staying the District Court (1984).

12. Objections to Trial of Adversary Proceeding No. 14 and Motion to Dismiss (1986).

13. Notice, Motion and Order to Compel Compliance with Mandate; to Abstain; to Permit State Court Action; and to Dismiss (1986).

14. Transcript of Hearing of May 7, 1986, on Motions.

15A. Volume 1—Transcript of Trial, May 19, 1986.

15B. Volume 2—Transcript of Trial, May 19, 1986.

16. Motions to find facts specially under FRCP 52, Bankruptcy Rule 7052, and to set aside and reconsider FRCP 59 and Bankruptcy Rule 9023 (June 2, 1986).

17. Motion and Affidavit of John A. Sloan for Recusal (June 5, 1986).

18. Motion and Affidavit of Douglas Gene Sharp for Recusal (June 2, 1986).

19. Findings of Fact and Conclusions of Law of Respondent (June 1, 1986).

20. Judgment of Respondent (June 11, 1986).

21. Cancellation Letter putting Trustee bankrupt and the Court on notice that the contract had been cancelled (May 29, 1986).

22. Letter to Respondent enclosing Notice and citing authority (May 29, 1986).

23. Transcript of hearing of June 18, 1986.

24. Order granting Temporary Restraining Order (June 16, 1986).

25. Order granting Preliminary Injunction (June 18, 1986).

25A. Motion to Dissolve Injunctions (June 16, 1986).

26. Order of Respondent denying Recusal Motions (July 3, 1986).

WHEREFORE, Petitioners pray:

1. That an Order be issued, directed to the Honorable Joe Lee, Bankruptcy Judge of the United States District Court for the Eastern District of Kentucky, requiring him to show cause in this Court at a time to be designated, why he should not carry out the literal terms of the mandate of this Court by upholding the contract rights of termination, by upholding the mandate reserving the surface rights to the Petitioner, and by finding, as evidence before him proved, that the Trustee has had ample opportunity to assume the contract and has failed to do so, and that therefore the Trustee has no further interest in Petitioners' property, and that a Writ of Mandamus be issued to enforce these terms of the mandate.

2. That a Writ of Mandamus issue from this Court directing the Honorable Joe Lee to dismiss the Trustee's action against property or contract rights in which the Trustee has no interest.

3. That a Writ of Mandamus issue from this Court directing the Honorable Joe Lee to disqualify himself and to vacate and set aside those Orders entered by him after the filing of Motions and Affidavits for Recusal on June 5, 1986.

4. That a Writ of Mandamus should issue directing that the injunctions issued on June 16 and June 18, 1986, be set aside and held for naught immediately, in order to prevent further damage and trespass on Petitioner's property.

5. That Petitioners have such further additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

Morgan and Pottinger

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APPENDIX 15

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

In view of the fact that the petition accuses the court of disregarding the time constraints of former Bankruptcy Rule 607, it appears appropriate for the court to comment on the applicability of that rule. It is conceded that on November 3, 1972 the trustee timely filed an application for an extension of time within which to assume or reject the Lease Purchase Agreement involved in this controversy. Bankruptcy Rule 607 was promulgated by the Supreme Court on April 24, 1973 and took effect October 1, 1973. The order of the Supreme Court provided that the new rules shall be applicable to proceedings then pending, except to the extent that in the opinion of the court their

application in a particular proceeding then pending would not be feasible or would work injustice, in which the former procedure applies. Since the 60-day period provided for in Rule 607 had expired in this case long before the rule took effect, obviously application of that rule to this case is not feasible and would work injustice.

Both the bankruptcy court and the district court concluded that the Lease Purchase Agreement which is the subject of this controversy was not an executory contract. The Sixth Circuit has instructed us that the contract is executory and that the trustee should have been given an opportunity to assume or reject the Lease Purchase Agreement. The supplementary proceedings which this court is conducting are directed to that end. The original motion of the trustee requested additional time after a finding that the contract is executory within which to assume or reject the contract. The trustee has been granted an additional 100 days because the evidence at the hearing on May 19, 1986 indicated the prospective assignee of the Lease Purchase Agreement needed 90 days to conduct core drilling and other exploration of the property to determine the nature and extent of coal deposits underlying the property.

Prior to October 1, 1979 bankruptcy judges were required to preside at all meetings of creditors in addition to hearing and resolving litigated matters. During that period from 1972 to 1979 the records of this court indicate the bankruptcy judge spent an average of 175 of the 240 working days each year in the court room presiding over meetings of creditors or in trial in the 1,500 to 2,000 cases filed annually in this district during that period and another 36 days per year traveling to and from the six designated places of holding court in the district, which left only about 30 days per year for opinion writing and other work. Unquestionably, the progress of litigation suffered under such a system. That is why Congress by enactment of the

Banukruptcy Reform Act of 1978 relieved bankruptcy judges of the duty of presiding at meetings of creditors in order that we might devote more time to processing litigation. The present system is a great improvement. The records of the court indicate the oldest matter the court has under submission at this time was submitted on motion for summary judgment on February 4, 1976.

Respondent

Dated: July 16, 1986

(s) Joe Lee
Honorable Joe Lee
U. S. Bankruptcy Judge

APPENDIX 16

REPLY OF PETITIONERS TO RESPONSE OF HONORABLE JOE LEE

Petitioners feel that a Reply to the Response filed by the Respondent, the Honorable Joe Lee, is necessary, for the reasons set out hereinbelow.

The Supreme Court Order of April 23, 1973, made the new Bankruptcy Rules 607 and 906 applicable to pending proceedings unless their application was not feasible or would work an injustice, in which event former procedure applies. A copy of the pertinent portion of this Order is attached as *Exhibit 1.*

No injustice, hardship, or lack of feasibility was claimed, alleged, proved, or mentioned either by the Respondent or the Trustee in 1972 or 1973. It was not until 1986, in Respondent's Response, that it was first claimed that Rules 607 and 906 did not apply.

Indeed, the facts are that in 1972 and 1973, the Trustee could have cured the default in the contract by payment of

approximately $150,000.00, the arrearage, and the required tonnage of coal could have been mined within the required time limit of seven or eight remaining years under the contract.

Trustee, in 1986, cannot mine the coal within the 10 year contractual requirement which has already expired. Further, to assume the contract now, even if Petitioners were willing to reinstate it or waive the default, the Trustee now would have to pay $850,000.00 to $1,500,000.00 depending on interest allowed, before or at the time of his assumption. In other words, assumption in 1986 is indeed a greater hardship, and therefore a greater injustice, if not an impossibility, to the Trustee, and certainly the Petitioners whose contract has been terminated fourteen (14) years past.

From these facts, it is obvious that assumption in 1972 by the Trustee was both feasible and would have caused no injustice.

The argument advanced in the Response concerning the application of Rules 607 and 906 is both spurious and superficial. It is further illustrative of Respondent's determination to benefit the Trustee regardless of Petitioners' rights. We believe that the Respondent's prejudicial and adamant determination to take Petitioners' property for the benefit of the Trustee is further demonstrated by the facts and the law set out hereinbelow.

Respondent chooses to overlook the clause of the Supreme Court order, that if Bankruptcy Rules 607 and 906 do not apply, the former procedure does. Both the statute, 11 U.S.C. 110(b) and the overwhelming case authority, in existence in 1972 and 1973, controlled this action. The result, under the former procedure and case law, and Rules 607 and 906, is the same. Both the former statute and the case law compelled assumption or rejection within 60 days unless the time was extended.

The Trustee's Motion for Extension was, in effect, denied by the Respondent's Judgment in 1976, which held the Motion for Extension to be "moot" (Exhibit 6 of Petition for Mandamus). The Sixth Circuit, accordingly, held that the Trustee's Motion for Extension was denied. The Trustee did not appeal the denial, and this ruling is, therefore, final.

No other Motion for Extension or Motion for Assumption has ever been filed. Accordingly, under the "former procedure" required by the Supreme Court Order, and apparently now urged by the Respondent, the Trustee has no interest in Petitioners' contract, lands or coal. A copy of 11 U.S.C. 11(b) is attached as *Exhibit 2*. Copies of some case law decided under the former procedure are attached as *Exhibit 3* as follows:

Fletcher v. *Surprise*, 180 F. 2d 669 (7th Cir. 1950) at Page 675, 676;

In Re: Riviera Club, Inc., 280 F. Supp. 741 at Page 752 and 753 (W.D. Mo.), Aff'd Sub Nom, *Aylward* v. *Broadway Valentine Center, Inc.*, 390 F. 2d 556 (8th Cir. 1968);

In Re: Luscombe Engineering Company, 268 F. 2d 687 (3rd Cir. 1959) at Page 686, 687;

Wiemeyer v. *Koch*, 152 F. 2d 230 (8th Cir. 1945) at Page 234;

In Re: Gravure Paper and Board Corp., 234 F. 2d 928 (3rd Cir. 1956) at Page 930, 931;

Ten-Six Olive v. *Curby*, 208 F. 2d 117 (8th Cir. 1953) at Page 123;

Gulf Petroleum, S.A. v. *Collazo*, 316 F. 2d 257 (1st Cir. 1963) at Page 260.

On July 17, 1986, a week after this Petition for Writ of Mandamus was filed in this Court, Respondent entered the attached Order (*Exhibit 4*).

Apparently, Respondent realized the need to support his opinion (that the contract had not been terminated under its terms), and which terms were specifically not altered as stated in the Sixth Circuit opinion. Perhaps the July 17, 1986 sua sponte Order of Respondent attempts to overcome the record facts requested to be found by Petitioners in Paragraph 5 and 8 of Exhibit 16 filed with their original Petition for Mandate. These uncontradicted facts prove termination of the contract both before and after bankruptcy. This fact cannot be overcome by a contention that one joint lessor cannot give notice on behalf of the other joint lessors of termination. (Actually, no notice was required for immediate termination which was recognized by the Sixth Circuit Court of Appeals in its opinion).

Perhaps Respondent is not aware that the case cited by him in his July 17 Order does not support his contention that one joint lessor cannot give notice of termination on behalf of the other joint lessors. Of course, in a Court action of foreclosure, or to declare a forfeiture, all of the necessary parties, joint tenants and joint lessors must be joined as parties in the Court action. We file herewith as *Exhibit 5* the Gillem opinion, cited by Respondent in his Order, in its entirety, along with 50 A.L.R. 2d 1368 and *Webb* v. *Graf, et al.*, 289 Ky. 644, 159 S. W. 2d 433 (1942).

We also know that Respondent is aware of the law that cancellation rights must be upheld even after bankruptcy in executory contracts. The following cases have been brought to his attention on more than one occasion. Excerpts from them are filed herewith as *Exhibit 6*. They are as follows:

Schokbeton Industries v. *Schokbeton Products, Inc.*, 466 F. 2d 171 (5th Cir. 1972) at Page 174, 175;
In Re: Trigg, 630 F. 2d 1370 at Page 1374, 1375.

The uncontradicted evidence of cancellation of the contract by the Petitioners both before and after bankruptcy, and the above facts and law are mentioned in this Reply, not by way of a Brief, but to illustrate to this Court the continued, relentless, determined advocacy of the Respondent on behalf of the Trustee to ignore the facts, the law, and the mandate of this Court, in order to take away the property of the Petitioners for the benefit of the Trustee.

WHEREFORE, Petitioners pray that Respondent should be directed to set aside all Orders entered by him after June 5, 1986 (date of last Motion for Recusal); that this matter should be assigned to another Bankruptcy Judge; and that the relief requested in the Petition for Mandamus should be granted.

Respectfully submitted,

Morgan and Pottinger

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EXHIBIT 4

UNITED STATES BANKRUPTCY COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
LONDON

Case No. 72-650

IN RE:
BECKNELL & CRACE COAL COMPANY, Debtor
RUBEN G. HICKS, Trustee - - - - - *Plaintiff*

v.

LOLA GAY SLOAN, et al. - - - - *Defendants*

On its own motion, the court finds that the Findings of Fact and Conclusions of Law entered herein by the court on June 11, 1986, are amended to cite *Union Gas & Oil Co.* v. *Gillem, et al.*, 271 S. W. 626 as authority for the proposition that where there are multiple co-tenant lessors, one of the co-tenants may not act in behalf of the others in declaring forfeiture of a lease.
Dated: July 17, 1986.

By the Court—

(s) Joe Lee
Judge

APPENDIX 17

TRUSTEE'S RESPONSE TO PETITION FOR WRIT OF MANDAMUS

Comes Ruben G. Hicks, Trustee for the Becknell & Crace Coal Co., Inc., Bankruptcy Action No. 72-650, ("Trustee"), by counsel, and for his response to the Writ of Mandamus filed herein, submits the following.

THE WRIT OF MANDAMUS FILED BY THE PETITIONERS IS PROCEDURELY IMPROPER

The remedy of Mandamus under 28 U.S.C. §1651 is ". . . a drastic one, to be invoked only in extraordinary situations." *Kerr* v. *United States District Court,* 426 U. S. 394, 48 L. Ed. 2d 725, 96 S. Ct. 2119 (1976), quoted at 426 U. S. 402; *Will* v. *United States,* 389 U. S. 90, 19 L. Ed. 2d 305, 88 S. Ct. 269 (1967). It is viewed as extraordinary because it places the trial judge in the position of a litigant, and it encourages piecemeal litigation. *Kerr, supra.* The burden is on the party seeking the mandamus to show, clearly and indisputedly, that an exceptional circumstance amounting to a judicial usurpation of power exists in the court below. *Will, supra.* The party requesting the extraordinary relief must also have no other adequate means to obtain the relief he desires. *Kerr, supra.* And the writ is never a substitute for appeal. *Schlagenhauf* v. *Holder,* 379 U. S. 104, 13 L. Ed. 2d 152, 85 S. Ct. 234 (1964).

In their petition, the petitioners alleged that the Hon. Joe Lee, United States Bankruptcy Court for the Eastern District of Kentucky, intentionally ignored the mandate of this court by refusing to follow the opinion and order in the *In Re Becknell & Crace Coal Co., Inc.,* 761 F. 2d 319 (1985), on remand to Judge Lee. As is more fully set out below, the Trustee believes that Judge Lee's opinions and orders

on remand were entirely consistent with the mandate of the Court of Appeals and, indeed, were the only reasonable interpretations of the Court's mandate.

The adversary action pursuant to the remand has proceeded, and indeed the very orders which the petitioners complain of have been appealed to the District Court by petitioners. In its order of June 11, 1986, the Bankruptcy Court approved the Trustee's request to allow Shamrock Coal Co., Inc. to enter onto and disturb the petitioners' surface rights in order to explore and prospect for coal, pursuant to the Option to Lease Agreement between Trustee and Shamrock. The request, and the Court's order, were pursuant to the terms of the Lease Purchase Agreement between the petitioners and the debtor, the Trustee's predecessor in interest. The petitioners allege to this Court that only a writ of mandamus can prevent the entry on the premises, and therefore they have no other adequate remedy.

The judgment of June 11, 1986, and the entry upon the land by Trustee's designee, might have been stayed if the petitioner had made a proper motion for a stay pending the appeal. Bankruptcy Rule 8005 provides that a motion for a stay of a judgment pending appeal must ordinarily be made in the Bankruptcy Court. The petitioners made no such motion, but instead have requested a stay from the District Court, alleging that the bankruptcy judge's injunction against the petitioners from proceeding in the Kentucky Circuit Court to prevent Shamrock from entering on the premises was the equivalent of denying a motion for a stay. Nor have the petitioners offered to post a supersedeas bond to protect the Trustee and the creditors of the estate from the possible effects of such a stay. Petitioners' situation is not unusual or in any sense extraordinary, but is shared by every litigant unhappy with the outcome of a trial trying to stop the effect of a judgment while the matter

is heard on appeal. To paraphrase Justice Marshall, the petitioners have ". . . an avenue far short of mandamus to achieve precisely the relief they seek." *Kerr* as U. S. 405.

The petitioners are asking this Court to "interpret" some of the language in *In Re Becknell Crace, supra.* They maintain that a writ of mandamus is necessary to force Judge Lee to follow the tortured interpretation that the petitioners ascribe to the language of that decision. As we argue below, we believe that there is nothing arcane about the Court's language, and that Judge Lee followed the only reasonable reading of the Court's mandate. But if a writ of mandamus should not be used as a substitute for appeal, it certainly should not be used as a substitute for a Petition for Rehearing. Indeed, this Court denied the petitioners' petition for rehearing on July 11, 1985.

THE OPINIONS, ORDERS AND JUDGMENT OF JUDGE JOE LEE WERE CONSISTENT WITH THE MANDATE OF THE COURT OF APPEALS AND THE LAWS OF THE UNITED STATES

On remand to the Bankruptcy Court, a hearing was held in the adversary action previously begun by the Trustee. The Trustee requested that it be permitted to enter into an Option to Lease Agreement with Shamrock Coal Co., Inc. d/b/a Greenwood Land and Mining Company, and that Shamrock be allowed to enter onto the premises and conduct exploration and prospecting pursuant to that agreement. Such exploration was necessary before Shamrock could determine whether it desired to enter into the lease attached to the Option to Lease Agreement. For that same reason, the Trustee also requested an extension of time to determine whether it would be in the best interest of the estate to assume or reject the lease purchase agreement. The petitioners objected to the Trustee's request. The pe-

titioners argued that the *In Re Becknell & Crace, supra,* decision stated that the debtor in bankruptcy, and not the Trustee, owned the fee simple interest in the coal; that the Court reaffirmed the petitioners' right to terminate the agreement; and that the Court held that since the Trustee had never been given the opportunity to assume or reject the lease, that opportunity was lost forever. Therefore, the petitioners argued, the Sixth Circuit affirmed that the Trustee had no rights in the coal and no right to act under the contract, and therefore the entire action should be dismissed.

Judge Lee rejected this tortured construction the petitioners urge for *In Re Becknell & Crace, supra.* In that decision, the Court stated "we believe that the terms of the Lease-Purchase Agreement granted Becknell a fee simple interest in the coal." *In Re Becknell & Crace* at 321. That statement is undeniably correct. The debtor, Becknell & Crace Coal Co., Inc., did take a fee simple interest in the coal through the lease-purchase agreement, and the Trustee in turn was vested through 11 U.S.C. § 110 of the old Bankruptcy Act with title to that property and all other property of the debtor.

The Court wrote that "we note that our decision does not alter the provisions of the contract." *In Re Becknell & Crace* at 322. Since the Court only gave the agreement its legal effect, and did not attempt to rewrite it, such a statement is also undoubtedly correct. The petitioners apparently believe the language was intended to resurrect, or reaffirm their right to terminate the agreement despite the intervention of the bankruptcy proceeding. At the hearing below, the petitioners put on evidence to argue that the right to terminate the agreement had been exercised prior to the filing of the petition for relief in bankruptcy by the debtor. One of the petitioners, Tony Sloan, testified that he gave oral notice of the termination to an employee

of Becknell & Crace Coal Co., Inc. In his opinion of June 11, 1986, Judge Lee correctly noted that the issue of termination prior to the filing of bankruptcy was res judicata since it was necessarily an issue in the litigation previously before the Bankruptcy Court, which was appealed to the District Court and finally to the Sixth Circuit Court of Appeals. Judge Lee also found that there was no proof of written notice of default as required by the Agreement, there was no showing that the employee to whom the oral notice was given was an officer of the debtor corporation, and no evidence that Tony Sloan had the power to terminate the agreement on behalf of the several other lessors.

The petitioners apparently have conceded that there was no effective termination prior to bankruptcy, and now urge that the Sixth Circuit has breathed new life into their right to terminate, so that they have the power to exercise their right subsequent to the petition for relief in bankruptcy. But such an inventive reading of the Court's language would conflict directly with the Bankruptcy Act, which allows the Trustee to assume or reject an executory contract, depending upon which action would be in the best interest of the unsecured creditors of the estate. 11 U.S.C. § 110(b).

On November 3, 1972, the Trustee filed an answer to the petitioners' Petition to Direct Rejection of the Lease Purchase Agreement. The Trustee asserted that the Agreement was not executory, and asserted his interest in the fee simple conveyance of the coal. On the same date, being within 30 days of his appointment, the Trustee filed an application to extend the period within which to assume or reject the lease agreement. In that application, the Trustee noted that while he claimed a fee simple in the real estate, that claim was disputed by the petitioners, who were claiming the Agreement to be executory. The Trustee stated that until that controversy was decided, he would be unable

to determine the necessity of accepting or rejecting any such executory contract, if any such contract existed. The Bankruptcy Court subsequently held that the contract was not executory, and therefore the application for extension was moot. The District Court on appeal also held that the agreement was not executory, for different reasons. The Sixth Circuit, in *In Re Becknell Crace, supra,* reversed the lower Court in part, holding that the Agreement was at least in part executory.

The Court of Appeals noted that "because the Lease-Purchase Agreement was executory the Trustee should have been given the opportunity to assume or reject the contract. See 11 U.S.C. § 110." The Court observed that the Trustee had filed a petition for extension of time to assume or reject but the Bankruptcy Court, having determined that the agreement was not executory, denied the petition as moot. "The Trustee, therefore, did not have an opportunity to assume or reject the Lease-Purchase Agreement." The Court then ordered the action remanded. *In Re Becknell & Crace* at 322.

The Trustee was not in a position to know whether it would be in the best interest of the estate to assume or reject the contract before Shamrock has acted on its Option to Lease. As stated above, Shamrock would not know whether there was sufficient coal to justify exercising this option until exploration and prospecting were conducted in accordance with the Option. Along with its request to be allowed to enter into the Option to Lease Agreement, the Trustee also requested an extension of 100 days, coinciding with the option plus 10 days thereafter, to make his determination to assume or reject. In accordance with the mandate of the Court of Appeals, Judge Lee entered an order extending the Trustee's time so he would have that opportunity.

The petitioners apparently considered this Court's language quoted above to be simply historical narrative, stating what might have been, and not what the Court was directing on remand. It apparently does not trouble the petitioner that such a reading would give the language of the Court, and its directions to remand, no meaning and no effect.

28 U.S.C. §110(b) provides that the Trustee shall assume or reject an executory contract within 30 days after his qualification, but provides that the Court may for cause shown extend or reduce the time. The Trustee made just such a timely application. Since both the Bankruptcy Court and the District Court held that the agreement had no executory character, the Trustee never had the opportunity, as the Court of Appeals noted, to assume or reject.

The petitioners argue that under former Bankruptcy Rule 607 the Bankruptcy Court could not enter an order extending the Trustee's time to assume or reject later than 60 days following the Trustee's appointment. However, Section 110(b) contains no such limitation. As Judge Lee points out in his response to the above petition, former Rule 607 took effect on October 1, 1973, except to the extent that in the opinion of the Court the application of the Rule in a particular proceeding would not be feasable or would work an injustice. Therefore, the Bankruptcy Court was not bound by the 60 day limitation, as the limiting period had already well passed when the order was promulgated.

At the conclusion of the hearing on May 19, 1986, Judge Lee stated his opinion and ruling from the bench. Subsequent to that hearing, but before the opinion and order were entered, the petitioners filed a motion for the judge to recuse himself pursuant to 28 U.S.C. §144. The ground for the motion, as has been stated again before this Court in the petition for writ of mandamus, is that in the petitioners' view Judge Lee is in error, and since the petitioners believe

their view is the only conclusion a reasonable person could make, Judge Lee must be deliberately refusing to rule that the law lies in favor of the petitioners.

The petitioners have utterly failed to allege personal bias or prejudice on behalf of the judge as is statutorily required. *Parrish* v. *Board of Commissioners of Alabama State Bar,* 524 F. 2d 98 (5th C.A. 1975); *Davis* v. *Board of Commissioners of Mobile County,* 517 F. 2d 1044 (1975). "It is settled that the requisite basis for bias and prejudice under Section 144 must be extra-judicial." *Davis* at 1051. If the petitioners' allegations were found legally sufficient to support a motion for recusal, then every losing litigant in every court in the United States would have a similar right.

The petitioners argue that the mere filing of their motion prevented Judge Lee from entering the opinion and judgment on the hearing, or from enjoining the petitioners from suing Shamrock Coal Co., Inc. in State Court in order to prevent its entry on the premises. If their motion did prevent Judge Lee from taking any further action, that would have surely been a boon to the petitioners, as they would have avoided the ruling adverse to them and then been allowed to flaunt the jurisdiction of the Bankruptcy Court unchecked. However, 28 U.S.C. §144 prevents a judge from proceeding only upon the making and filing of a "timely and sufficient" affidavit of personal bias or prejudice. As indicated by Judge Lee in his order, a motion for recusal brought after nearly 14 years of litigation and subsequent to a ruling at which the moving party received an adverse ruling was simply not timely. Since the motion was neither timely nor sufficient the petitioners had no grounds to require the judge to recuse himself under 28 U.S.C. §144.

THE ACCUSATIONS AGAINST THE HON. JOE LEE AND THE LANGUAGE USED IN THE PETITION WERE IMPROPER

Most lawyers are familiar with the following bit of sophistry: when the facts are against you, argue the law; when the law is against yau, argue the facts; when both the law and facts are against you, make an ad hominem attack. Having prevailed in neither the law nor the facts in the course of this litigation, the petitioners apparently now feel the need to attack Judge Lee's honesty, character and integrity. The petitioners are not content with saying, "we believe Judge Lee is in error; we will appeal his decision." Instead, they repeatedly insist, "we believe Judge Lee is in error; he must be deliberately ignoring the facts and the law in order to aid the Trustee."

The Petition states Judge Lee "decided to ignore the termination rights in the contract and the Sixth Circuit mandate recognizing same." (p. 8); that Judge Lee was "wholly and unreasonably partial to Trustee" and that he acted "regardless of any argument, law, evidence, or even mandate of the Court . . ." (p. 9); that he "completely ignored his own record . . ." and that he made decisions "in the face of his own personal knowledge that they were wrong . . ." (p. 12); that he is "more interested in the Trustee reaping $4 million than he is in . . . the terms of the mandate of the Sixth Circuit." (p. 13); "the legal errors, conduct, and opinions of the respondent, from the bench, after the mandate of this Court are fragrantly and egregiously a gross abuse of his discretion" (p. 19-20); that Judge Lee was determined "to ignore mandates of the statute and rules, to ignore direct and uncontradicted evidence . . . and to ignore this Court's own mandate . . ." (p. 20); that he refused to "recognize the law of the case, the statutory mandates, the contractual terms, the conclu-

sive evidence adduced at the trial, and the literal language of the Court's mandate . . ." and that he was determined to "substitute his own version of the record, mandate, and law . . .", "it is evidence of a great determination on the respondent's part to capture an illusive windfall, the petitioners' coal." (p. 27). The Reply states: that Judge Lee's response to the mandamus is "both spurious and superficial. It is further illustrative of a respondent's determination to benefit the Trustee regardless of the petitioners' rights." And that Judge Lee has a "prejudicial and adamant determination to take petitioners' property for the benefit of the Trustee . . ." (Reply p. 2); that Judge Lee has engaged in a "relentless, determined advocacy . . . on behalf of the Trustee to ignore the facts, the law, the mandate of this Court, to take away the property of the petitioners for the benefit of the Trustee." The accusations are unsupported and the language is intemperate, and they have no place in appellate practice. *Roark* v. *King,* Ky., 696 S. W. 2d 787 (1985). That counsel for the petitioners, members of the bar and officers of this Court, and the pro se petitioner would employ such language surprises and saddens us.

WHEREFORE, the Trustee respectfully requests that the petition for writ of mandamus be denied, and for all other relief which may be appropriate.

(s) William S. Howard
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APPENDIX 18

REPLY TO PETITIONERS RESPONSE OF TRUSTEE

Because Petitioners believe that the Response of the Trustee is not accurate in its representations to this Court, and not responsive to the issues presented by the Petition for Mandamus, Petitioners respectfully submit the following:

Trustee's statement, page 2 of his Response, "and the writ is never a substitute for appeal", is inapplicable here. As stated on page 21 of the Petition for Mandamus, Petitioners have filed Notice of Appeal and a Motion for Leave for Appeal. Petitioners believe, as will be more fully discussed below, that an appeal will be totally ineffective to prevent the wrongful mining of their coal, and that certainly an appeal is not a substitute for the enforcement of this Court's mandate, which should not be subject to speculative interpretation.

This Court disposed of the exact argument made by the Trustee in *Ohio Environmental Counsel* v. *U. S. District Court, Southern District of Ohio, Eastern Division,* 565 F. 2d 393 @ 398 (6th Cir., 1977) as follows:

> We agree with the familiar litany that mandamus is a drastic remedy which should be sparingly exercised, but no other way to break the deadlock in which the District Court has placed the plaintiff is apparent. The use of mandamus to review the propriety of a stay of proceeding is well-established, *Fitrol Corp.* v. *Kelleher*, 467 F. 2d 242 (9th Cir.), cert. denied, 409 U. S. 1110, 93 S. Ct. 914, 34 L. Ed. 2d 691 (1972), and the Second Circuit has recently utilized the writ to order enforcement of an SIP. *Friends of the Earth* v. *Duffy*, 552 F. 2d 25 (2d Cir. 1977).

> [16] The defendant argues that mandamus is not a substitute for appeal, and thus cannot be utilized when 28 U.S.C. Section 1292(b) (certification of interlocutory orders) provides a potential remedy. *That argument is irrelevant here, since the basis of the order issued today is the District Court's abuse of discretion, rather than mistake of law.* Since there is no controlling question of law, a request for a Section 1292(b) certification would be a *pointless formality.* In any case, it appears clear that the District Court would have refused to certify his order as he in fact subsequently did. (Emphasis added)

Although we have taken the precaution of an appeal, we believe it may be a pointless formality since irreversible damage will have been done before a decision can be rendered on appeal.

Trustee next states (page 2 of his Response) "the request, and the Court's Order, were pursuant to the terms of the Lease Purchase Agreement between Petitioners and Debtor". This statement is inaccurate because the Lease Purchase Agreement (Exhibit 2 and 3 of the Petition for Mandamus) contained termination clauses, which, as Judge Nathaniel Jones stated, gave Petitioners an immediate right of termination, and which termination rights have long ago been exercised. Therefore, the request and the Court's Order could not be pursuant to the terms of the Lease Purchase Agreement. Actually, the "Court's Order" (Exhibit 20 of Petition for Mandamus) *states* that it is in conformity with its Findings of Fact and Conclusions of Law (Exhibit 19). These findings of the Court were demonstrably contrary to the facts, as shown in Exhibits 15 and 15A, and the law in reference to termination of executory contracts, and the mandate of this Court.

The Court's Order of June 1, 1986 (Exhibit 20) states:

> "That the Motion of the Trustee to extend the time to assume or reject the Lease Purchase Agreement, *to the extent it is executory,* be and it is hereby sustained".

This statement is shocking to Petitioners because no such Motion was before the Court and no hearing held on any such Motion. It is not listed in the docket sheet forwarded to Mr. Hehman by Respondent, Judge Lee. As stated by Judge Nathaniel Jones, the original Motion to Extend was denied (Respondent, Judge Lee, in 1976, held it to be moot because he found the agreement nonexecutory. Trustee never renewed his Motion or appealed it.)

On June 20, 1986, Petitioners filed a Notice of Appeal from the final Order entered by Respondent, Judge Lee, on June 11, 1986. On June 27, 1986, Petitioners filed a Motion for Leave to Appeal from the injunctions of June 18. The record on appeal to the District Court was filed on July 18, 1986, and the appeal from the June 11 Judgment was docketed on September 9, 1986, at least two weeks after the exploration and drilling on Petitioner's land was completed. The Motion for Leave to Appeal filed June 27, 1986 from the injunctive orders of June 18 has never been acted on by the District Court.

To illustrate the urgent need for this Court to supervise its own mandate, to determine what it meant by its own language, rather than leave supervision and interpretation to the uncertain and slow appeal process, Petitioners attach as exhibits hereto their Motion for Leave to Appeal (Exhibit 1), Answer of Trustee to Motion for Leave to Appeal (Exhibit 2), and Reply to Trustee's Answer (Exhibit 3).

Of course, it would be impossible for the Petitioners to execute a $4,000,000.00 bond as argued by the Trustee in

his Answer, in view of the granting of the injunctions without any evidence as to irreparable damage (Exhibit 23 of Petition for Mandamus), and in view of the summary disposal by the Respondent, Judge Lee, of the Motion to Dissolve the Injunction (Exhibit 25A), it was evident to Petitioners that motion for stay before Respondent, Judge Lee, would be a "pointless formality".

Trustee erroneously states that Petitioners are asking this Court to "interpret some of its language, to force Judge Lee to follow Petitioner's tortured interpretation" (page 3 of Trustee's Response). The Petition for Mandamus makes it quite clear that Petitioners seek to have this Court enforce the literal plain language of its opinion expressed in short and simple sentences, such as,

> "We note that our decision does not alter the provision of the contract".

As Trustee says, there is nothing mysterious (arcane) about the intent of the Sixth Circuit. Clearly, this one sentence shows its intention to uphold the contract provisions. Trustee implies on page 4 of his Response that he "also requested an extension of time to determine whether it would be in the best interests of the Trustee to assume." He neglects to state that the only such request was filed in 1972, and which request was held to be denied by Judge Nathaniel Jones' opinion. Instead of a Petition to Extend, Trustee filed his Complaint to lease or sell without assuming. Please review Petitioner's Exhibit 9 (Trustee's Adversary Complaint) which clearly sets out the Trustee's position that he is the owner and wants to lease or sell the Petitioner's land.

Again, contrary to Trustee's statement, Petitioners have not argued that the Debtor "owned the fee simple interest", and the words "affirmed" or "reaffirmed" in reference to cancellation or ownership interest have not been

used. Instead, Petitioners have argued only the language of the Sixth Circuit mandate stating that it granted Becknell (the Debtor) a fee simple interest, but that this must be a defeasible or a conditional fee simple interest because of the qualifying language, set out immediately below this holding of Judge Nathaniel Jones, specifying one of the conditions precedent to obtaining title.

Petitioners have pointedly and expressly argued that the Sixth Circuit Mandate *did not award any interest to the Trustee,* and that instead, the Sixth Circuit Mandate expressly upheld the contract provisions. Contrary to what the Trustee implies, Petitioners believe that, had the Sixth Circuit intended to award the Trustee a title to the coal, it would have said so. Had it intended the remove the conditions precedent in the contract for obtaining a fee simple absolute title, or to remove the cancellation clauses therefrom, it would have said so. We must believe that Judge Jones was very careful in his selection of words and in his language in this opinion. We believe he very carefully did not award the Trustee any interest whatsoever in Petitioner's coal or land.

In fact, it is the "tortured construction" of the Trustee and of the Respondent, Judge Lee, that totally emasculates the Sixth Circuit Mandate and renders it useless. It seems that the attitude of the Trustee and Respondent Lee towards the language of the Sixth Circuit Mandate is intended to reinstate the 1976 Judgment of Respondent Lee giving the Trustee absolute title to Petitioner's coal. Judge Lee's 1976 opinion was not even upheld by Judge Siler in his 1982 opinion.

As shown by the exhibits filed in the Petition for Mandamus, Petitioners had declared the Lease Purchase Contract terminated both before and after bankruptcy. There is no basis for Trustee's statement (page 6, Trustee's Response) that Petitioners "conceded that there was no ef-

fective termination prior to bankruptcy". Trustee knows that Petitioners have continuously insisted on upholding the cancellation clauses. The contracts were declared terminated in writing in the Petition filed for rejection in August of 1972 by Petitioners. As late as the letter dated May 29, 1986 filed as one of the exhibits near the end of Exhibit 23 with the Petition for Mandamus, the cancellation of the contract was reiterated to all the parties.

The right to terminate pursuant to contractual terms of an executory contract is not "inventive reading of the Court's language" (page 6, Trustee's Response). It is the law established unequivocally by all jurisdictions, including the Supreme Court of the United States in the following language from *Thompson* v. *Texas-Mexican Railway Company,* 66 S. Ct. 937, 328 U. S. 134, 90 L. Ed. 1132:

> "It was an executory contract subject to termination on a specified notice . . ." "Cancellation of a contract pursuant to its terms alters, of course, rights and duties of the Trustee. But the bankruptcy rule is that he takes the contracts of the Debtor subject to their terms and conditions. Contracts adopted by him are assumed cum onere. The general rule is (1) that if the other party had a right to terminate the arrangement, that right survives adoption of the contract by the Trustee; and (2) that the incidents of termination, except as it interferes with the exclusive jurisdiction of the Bankruptcy Court, may be litigated in any Court where the Trustee may be sued"

An example of the "inventive" interpretation by the Trustee of the Sixth Circuit holding in this case is his statement on page 7 of his Response that the Sixth Circuit held "that the agreement was at least in part executory". The language of the Sixth Circuit on page 322 of Exhibit

1 of the Petition for Mandamus is "we believe the contract is executory" and "as a result, the Lease Purchase Agreement was executory". No language in the Sixth Circuit opinion even implies that the contract was only partially or "to a certain extent" executory. This interpretation has been given to the language by both Respondent, Judge Lee, and the Trustee. Of course, they would like to eliminate from the contract the many conditions precedent required for title, and the cancellation clauses, and not take the contract cum onere, by assuming only those portions of the contract which are beneficial to them.

Of course, the Sixth Circuit held the entire contract to be executory, and the right of cancellation by both parties is one of the big reasons that it is executory since it can never be completed if either party has a right to cancel. Obviously, the Trustee, had he assumed this contract in 1972, would have had the same contract right to cancel as did the Petitioners. This is necessary to avoid cost and unprofitable liability to the bankrupt estate in the event an executory contract becomes unprofitable or unperformable.

To this date, Trustee has not assumed the contract (the contract is impossible to perform in its terms now and cannot be cured at this date). Trustee has only claimed that he has title and can sell or sublease regardless of Petitioner's contract rights as to termination and as to performance.

The facts in this case shown by the Petition, Reply and exhibits attached thereto, and the facts shown in the prior record on appeal in this Court leading to its mandate, No. 83-5846 and No. 83-5847, are not contradicted or disputed. Practically, all of the facts are those produced by the Trustee's witnesses. We believe that all of these facts suport the Petitioners. The exhibits and the contracts suport the Petitioner's position.

The law as to executory contracts in bankruptcy and the necessity for rejection or assumption and the rights of cancellation thereunder support Petitioner's position overwhelmingly. It is remarkable that Trustee on page 10 of his Response can state otherwise. He can cite no cases contrary to those cited by the Petitioners in their pleadings herein.

He then engages in a "ad hominem" attack on counsel. Petitioners have made no "attack on Judge Lee's honesty, integrity, and character". Such statement is totally unjustified. Each statement as to Judge Lee's partiality to Trustee is supported by record facts as shown in the Petition for Mandamus and Reply. Lifting bare phrases, out of context, do not support the Trustee's unjustifiable attack on counsel.

Even more extraordinary is that Trustee makes no argument and cites no law or facts contrary to those cited by the Petitioners in this record.

The Petition for Mandamus was brought to (1) compel obedience to the literal language of this Court by enforcing the exact terms of the contract, including its cancellation clauses; (2) to compel dismissal of the Trustee's suit for lack of jurisdiction because the Trustee was given no title or interest in Trustee's lands by this Court, and has not assumed the contract, and that Respondent Lee has no jurisdiction to enjoin enforcement of Kentucky mining statutes in a suit brought against the Department of Natural Resources and the violator of the statute, Shamrock Coal Company; (3) to compel recusal and voidance of the Orders entered after Motion for Recusal was made.

We submit that the Trustee has responded by a personal attack on counsel rather than to substantively address the issues with any valid legal argument.

WHEREFORE, Petitioners pray that their Petition for Mandamus be granted and for all other and proper relief.

Respectfully submitted,

Morgan and Pottinger

(s) By: Elmer E. Morgan
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(s) John A. Sloan
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EXHIBIT 1

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF KENTUCKY
AT LONDON

No. 72-650

In Re:

BECKNELL & CRACE COAL CO., INC.
DEBTOR
RUBEN G. HICKS, TRUSTEE - - - - *Plaintiff*

v.

LOLA GAY SLOAN, et al. - - - - *Defendants*

A. P. No. 14

MOTION FOR LEAVE TO APPEAL

Defendants and Appellants, Tony Sloan, Lola Bettye Sloan, Ned T. Sloan, Jimmie Sloan, Margaret Sloan, and Bruce R. Sloan, by counsel, and John A. Sloan, pro se, move the Court for leave to appeal pursuant to Bankruptcy Rule 8003, from the Temporary Restraining Order of June 16, 1986 and Preliminary Injunction entered by the Bankruptcy Court on June 18, 1986, and in support of their motion submit the following:

STATEMENT OF FACTS

1. On or about May 8, 1985, the United States Court of Appeals, Sixth Circuit, rendered a decision in this proceeding declaring that the Lease Purchase Agreement, dated January 22, 1970, between Becknell-Crace and the Sloans is an executory contract. The decision states that

the "Lease-Purchase Agreement granted Becknell a fee simple interest in the coal." However, the opinion clearly pointed out that all the terms of the Lease Purchase Agreement remain unaltered. The excerpt from the Lease Purchase Agreement quoted by the Sixth Circuit Mandate, says that,

> "When One Million Dollars ($1,000,000.00), not including wheelage fees, has been paid to the party of the first part; party of the second part [Becknell] *shall be and become* owner in fee simple of all coal remaining on these premises." (Emphasis added)

In other words, upon performance of the terms of the Lease Purchase Agreement, the fee simple interest is realized. (The contract contained other conditions precedent such as mining 3 million tons for ten years). Further, the Agreement, as amended, and, as held by the Sixth Circuit, gives the Sloans a right of immediate termination of the contract. The opinion states, unequivocally, that the Sloans own all the surface rights in addition to certain blocks of coal at certain intervals.

2. In November, 1972, within the sixty (60) day mandatory period required by 11 U.S.C. 110(b), the Trustees moved the Bankruptcy Court for an extension of time to assume or reject the contract. This motion was never actually denied or granted by the Bankruptcy Court. Instead, in 1976 the Bankruptcy Court entered a Judgment stating that the motion for extension was moot because the contract was not executory. The Sixth Circuit held that the motion had been denied by the Bankruptcy Court.

3. The Sixth Circuit Court of Appeals affirmed in part, reversed in part, and remanded the proceeding. The opinion which was reversed and remanded by the Sixth Circuit was that of the District Court entered by Judge Siler in March of 1982, not the opinion of the Bankruptcy Court.

The Bankruptcy Court Judgment was affirmed by Judge Siler subject to the terms of Judge Siler's opinion which consisted of two main holdings:

(1) That the bankrupt had an estate for years subject to the contract rights of mining; and

(2) That the contract was not executory.

The Sixth Circuit Court of Appeals affirmed in part and reversed in part and remanded the proceeding. The Sixth Circuit opinion did not say that the Trustee had any title whatsoever, and did not say that the Trustee should be given a still further chance to assume the contract. Such a ruling would violate the provisions of 11 U.S.C. 110(b) and 11 U.S.C. 365(d)(1), which obviously the Sixth Circuit would not do.

The hearing held on May 19, 1986 by the Bankruptcy Court resulted in the Court's Judgment and findings of fact entered on June 11, 1986 and which findings of fact were contrary to the direct evidence submitted at the hearing. The Judgment also granted the Trustee an extension of time for 100 days in which to assume or reject the contract, and authorized the Trustee to enter into an option agreement with a proposed lessee giving the right to the lessee to proceed immediately to enter on the Sloans land for coal exploration.

4. On or about June 2, 1986, and June 5, 1986, the Sloans, and John Sloan filed motions and affidavits alleging bias or prejudice on the part of the Bankruptcy Court and requesting recusal. Subsequently, on June 11, 1986, the Bankruptcy Court entered its Judgments and findings of fact and conclusions of law from the May 19, 1986, hearing or trial. On or about June 16, 1986, when no ruling had been made by the Bankruptcy Court on the recusal motions, the Bankruptcy Court entered a Temporary Restraining

Order granting the Trustee virtually all the relief, temporarily, which the Trustee requested in his Motion for Preliminary Injunction.

5. On June 18, 1986, the date set for hearing the Trustee's Motion for Preliminary Injunction, counsel for the Sloans objected to the Bankruptcy Court hearing the Trustee's Motion in face of the prohibition, in 28 U.S.C. 144, against Judge Lee hearing any further proceedings. The Bankruptcy Court then announced it would rule first on the recusal motions, and immediately proceeded to overrule same. The Court then continued to hear the Preliminary Injunction and granted the Injunction at the end of the hearing on June 18, 1986.

QUESTIONS ON APPEAL

The Defendants Contend:

1. That the Bankruptcy Court clearly erred in granting a Preliminary Injunction which prohibited the Defendants from protecting their surface rights mandated to them by the Judgment of the Sixth Circuit Court of Appeals.

2. That the Bankruptcy Court clearly erred in granting the Preliminary Injunction with no evidence or proof of any kind offered or presented to the Court regarding damage, harm, or irreparable injury that the Trustee must prove, before such an Injunction could be granted.

3. That the Bankruptcy Court clearly erred in enjoining the enforcement of Kentucky statutory and regulatory provisions, a violation of which is a misdemeanor subjecting the violator to imprisonment and fines. The prohibition of enforcement of State criminal laws is totally outside bankruptcy jurisdiction.

4. The Bankruptcy Court clearly erred in enjoining Defendants from preventing the trespass, entering and damaging of their property by the Trustee's agent, after

the Defendants had filed a Notice of Appeal of the Judgment permitting same, and before the ten day automatic period for carrying out a Judgment had expired.

5. That the Bankruptcy Court clearly erred in enjoining the Sloans from terminating the Lease Purchase Agreement under the uncontradicted evidence produced before the Court on May 19, 1986 and from terminating after bankruptcy as permitted by the contract, and by law, and by the terms of the Sixth Circuit mandate.

RELIEF SOUGHT

1. Dissolution of the Preliminary Injunction granted by the Bankruptcy Court on June 18, 1986;

2. Entry of a Stay Pending Appeal of the June 11, 1986 Judgment.

REASONS WHY AN APPEAL SHOULD BE GRANTED

Entry by the Bankruptcy Court of the Order Granting Preliminary Injunction was the equivalent of denying the Sloans a stay of enforcement of the terms of the Bankruptcy Court's Judgment of June 11, 1986, and assured the Trustee the right to proceed under the terms of said Judgment even though said Judgment is on appeal. The Judgment of the Bankruptcy Court entered June 11, 1986, in part, circumvents or contradicts the rulings by the Sixth Circuit Court of Appeals herein in that the terms of the June 11, 1986, Judgment:

(a) Ignore the Sloans' repeated cancellations of the Lease Purchase Agreement with Becknell-Crace;

(b) Grants the Trustee an extension of time in which to assume or reject the executory contract between the Sloans and Becknell-Crace, even though the Bankruptcy Court had previously lost any jurisdiction to extend the period for assumption/rejection;

(c) Allows the Trustee, and Shamrock Coal Company, Inc., to enter the lands of the Sloans to explore for coal, and to damage the lands of the Sloans, without permission of the Sloans and without compensation to the Sloans, and contrary to the Sixth Circuit mandate;

(d) Effectively grants the Trustee a fee simple interest in the coal under an executory contract contrary to the mandate of the Sixth Circuit Court of Appeals. The Sixth Circuit opinion granted a fee simple interest, upon full performance under the Lease Purchase Agreement, only to the bankrupt corporation and discussed the Trustee's assumption problems without directing that he be given another extension, after thirteen and one-half years, to assume or reject.

This Appeal should be granted, and a stay pending Appeal should be granted, because the June 11, Judgment and the subsequent Injunctions are clearly contradictory to rulings of the Sixth Circuit Court of Appeals. The Sloans are being immediately irreparably harmed by the wrongful taking and analysis of coal samples from their property and by the trespass and wrongful use of their surface, and such harm will be continued unless the Injunctions are immediately set aside by this Court.

The Trustee's Motion for Preliminary Injunction was granted without any evidence being offered or presented by the Trustee regarding immediate, irreparable injury, loss or damage. Irreparable injury is sine quo non for the granting of preliminary injunctive relief. Mere economic injury is insufficient and the allegation of the threat of irreparable harm is insufficient, but the alleged threat of irreparable harm or injury must be actual, certain, and eminent. *U. S.* v. *Aluminum Co. of America,* D. C. Mo. 1962, 247 F. Supp. 308, affirmed 86 S. Ct. 24, 382 U. S. 12, 15 L. Ed. 2d 1; *Walt Peabody Advertising Service, Inc.* v. *Pecora,* D. C. Ky. 1974, 393 F. Supp. 328; *Patterson* v.

United Federation of Teachers, Local No. 2, D.C. N.Y. 1979, 480 F. Supp. 550; *First Presbyterian Church of Schenectady* v. *United Presbyterian Church in U. S.,* D.C. N.Y. 1977, 1430 F. Supp. 450. This is a principal of law that is well established by legions of cases.

The Trustee merely alleged "immediate, irreparable injury, loss or damage" but offered no proof because the Trustee knows that he faces no irreparable injury. The one asset all the parties herein are looking to is coal in the ground which has been there for millions of years, and which has not changed its character one bit in the 14 years this case has been litigated. However, the Sloans surface lands will be materially damaged while their rights to the coal are being litigated, and will almost certainly face other injuries through the Trustee and his agents during the normal delays of seeking appellate relief.

Incidentally, although these matters have been in litigation for 14 years, most of the delay from 1972 through 1978, at which time an appeal was taken to the District Court, was occasioned by long delays in obtaining Bankruptcy Court decision, and not by procrastination of counsel.

Morgan and Pottinger

By: _____

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EXHIBIT 2

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF KENTUCKY
AT LONDON

No. 72-650

IN RE

BECKNELL & CRACE COAL CO., INC., Debtor
RUBEN G. HICKS, Trustee - - - - *Plaintiff*

v.

LOLA GAY SLOAN, et al. - - - - *Defendants*

ANSWER TO DEFENDANT'S MOTION FOR LEAVE TO FILE APPEAL AND FOR A STAY PENDING APPEAL

Comes the Plaintiff herein, Ruben G. Hicks, Trustee, by counsel and pursuant to Bankruptcy Rules 8003 and 8005, and Federal Rule of Civil Procedure 62, submits the following:

COUNTERSTATEMENT OF FACTS

In its opinion in the case of *In Re Becknell Crace Coal Co., Inc.*, 761 070 319 (6CA 1985) the Sixth Circuit Court of Appeals wrote that the agreement of January 22, 1970, between the debtor in bankruptcy and the Defendants herein constituted a fee simple grant of the coal to Becknell-Crace Coal Company, Inc. and an executory contract between Becknell-Crace and the Sloans for the use of the surface rights. In effect, the Court held that the agreement was a bifurcated instrument, granting to the bankrupt, and

consequently the Trustee as his successor in interest, a fee simple absolute right to the coal in place, and a contractual right to move on to and disturb the surface in order to extract the coal, within the limitations of the agreement. The conveyance of the fee in coal was of course absolute, with the agreement providing for royalties realized from the mining of the coal to be paid in return for the conveyance up to the sum of $1,000,000. According to the agreement, the consideration for the contractual right to use the surface would be through wheelage payments.

The Court wrote that its decision did not alter the provisions of the contract. This is in accordance with the recognized principle that if a trustee assumes an executory contract he does so cum onere. The Court did not, as the Defendants claim in their motion, uphold the right of the Sloans to terminate the executory portion of the agreement after the filing of the petition and after the Bankruptcy Court assumed jurisdiction.

The Sixth Circuit did not hold that the Trustee's timely motion for an extension of time to assume or reject should have been denied by the Bankruptcy Court. The Honorable Joe Lee, consistent with his opinion that the entire agreement was non-executory, held that the motion for an extension was moot. After holding that a portion of the agreement was executory, the Court of Appeals noted that the Trustee had never been given the opportunity to assume or reject, and accordingly remanded to the Bankruptcy Court. There is no significance in the fact that the Sixth Circuit refers to the fee simple property right and the contractual right of Becknell-Crace and not specifically to the rights of the Trustee. By operation of the Bankruptcy Act, the Trustee succeeds to the rights of the bankrupt arising from the pre-petition agreement with the Sloans.

On November 15, 1982, a complaint was filed by the Trustee beginning this adversary action, which requested

from the Court an order and judgment allowing the Trustee to enter into an Option to Lease and, if the option were exercised, a Coal Lease, with the Greenwood Land and Mining Company, an operating division of Shamrock Coal Company. On March 13, 1986, the U. S. District Court, London Division, entered an order sustaining the Trustee's motion to lift the stay on the adversary action imposed by the Court of Appeals pending the appeal. The Trustee moved for a trial date, and the matter was heard on May 19, 1986. After the hearing of that action, and the consideration of evidence offered by both parties, the Court found that the proposed Option to Lease agreement was in the best interests of the creditors of the estate and that it was the best offer with respect to the sale of the Trustee's interest in the property. The Court also found that the Defendants did not properly terminate the agreement before the petition for relief was filed. It also found that the Trustee had filed a timely motion for the extension of time to assume or reject the executory portion of the contract, and that pursuant to the opinion of the Court of Appeals, the Trustee was entitled to have that motion sustained. Finally, the Court found that the terms of the Lease Purchase Agreement gave the Trustee, and therefore its assignee, the right to enter onto the surface and conduct exploration for coal. The Option to Lease itself provided for a ninety day period to explore for coal, which began to run upon the entry of the Court's order of June 11, 1986. Although an appeal of this order by the Defendants followed, no motion for a stay of the judgment pending appeal was made in the Bankruptcy Court.

Subsequent to the Bankruptcy Court's order of June 11, 1986, an action was filed in Clinton Circuit Court, Kentucky, by the Defendants herein, seeking to enjoin the Shamrock Coal Company from proceeding on the premises, as was specifically allowed by the order of the Bankruptcy

Court. Upon motion and notice by the Trustee, a temporary restraining order was entered by the Bankruptcy Court on June 16, 1986, and upon motion, notice and a hearing, a preliminary injunction was entered on June 18, 1986, enjoining the Defendants herein with taking any action to interfere with the Trustee's option with Shamrock Coal Company or with Shamrock's entry on the premises, or attempting to terminate the Lease Purchase agreement.

After the hearing on June 11, 1986, and after the Judge had announced his findings and conclusions from the bench, the Defendants then moved Judge Lee to recuse himself pursuant to 28 USC Section 144 alleging personal bias or prejudice against the Defendants. At the hearing on June 18, 1986, and then by written order of July 3, 1986, Judge Lee held that the motion to recuse after the conclusion of trial and before the entry of judgment was simply not timely nor was the supporting affidavit sufficient as a matter of law.

Although the Defendants styled their motion herein as one for leave to file appeal, on page 5 of that motion, under the heading "Relief Sought," the Defendants asked this Court for a dissolution of the preliminary injunction entered June 18, 1986, and for a stay pending appeal of the June 11, 1986 order and judgment.

RESPONSE TO MOTION FOR LEAVE TO FILE APPEAL

Bankruptcy Rule 8003 provides that an appeal of an interlocutory bankruptcy order may only take place after leave has been granted by the District Court. The Rule itself does not make clear the standards for granting such leave. By analogy, such motions should be compared to the determination which must be made under 28 USC Section 1292(b) the statute dealing with appeals of interlocutory orders from the District Court to the Court of Appeals.

See *1 Collier on Bankruptcy,* 15th edition, paragraph 3.03 (d), 3-126. That statute requires the District Judge to make a determination that an interlocutory order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ".

The Defendants have not made any showing that an appeal of the preliminary injunction is in any way warranted. In its ruling from the bench after the trial on May 19, and in its Findings of Fact, Conclusions of Law and Judgment entered June 11, the Court found (1) the Option to Lease agreement was in the best interests of the creditors of the estate and the Trustee should be allowed to enter into it, (2) that the motion of the Trustee to extend the time to assume or reject the agreement, to the extent that it was executory, was sustained, and the consideration of the motion was mandated by the Court of Appeals and (3) that the Trustee, his agents, and the agents of the lessee under the Option to Lease were permitted to enter and to conduct exploration and prospecting on the premises, as is specifically provided for in the Lease Purchase Agreement.

Defendants have a right to appeal the Judgment, and indeed have filed a notice of appeal, but rather than request a stay of the Judgment as provided under the Bankruptcy Rules, the Defendants sought to enjoin the effect of the Judgment by filing suit in State Circuit Court. The Defendants' action was not, as they imply, the enforcement of state criminal statutes, as obviously the Defendants have no criminal, police or regulatory authority. It was instead an attempt to prevent Shamrock Coal Company from entering on the premises and exploring for coal, on the grounds that Defendants were the surface owner and such an entry would be trespassing. This is directly contrary to the Bankruptcy Court's conclusion that such entry

and exploration is permitted under the terms of the Lease Purchase Agreement, and its specific order that Shamrock be allowed to do so. Since a preliminary injunction was nothing more than the protection by the Bankruptcy Court of its jurisdiction over the administration of and the property of the estate, and of the integrity of its judgment, any argument Defendants have with the preliminary injunction are more properly brought up on the appeal of the Court's June 11, 1986 Judgment. Therefore any appeal from the interlocutory order granting preliminary injunction would in no way materially advance the ultimate termination of the adversary action or aid in the determination of the appeal.

The Defendants have not cited nor is there a substantial ground for difference of opinion as to the propriety of the Bankruptcy Court's action in granting the injunction. Defendants' argument that the entry by Shamrock on the land is without their permission or compensation ignores the fact that the Lease Purchase Agreement granted the bankrupt, and consequently the Trustee and his assigns, the right to enter on the surface, explore, and generally do such things as are necessary in the mining of the Trustee's mineral estate in exchange for wheelage. Nor does the opinion of the Sixth Circuit mandate other than that which the Judge has granted.

RESPONSE TO MOTION FOR STAY

Although the Defendants have appealed the Judge's order of June 11, they made no motion in the Bankruptcy Court for a stay of this judgment. Instead, as noted, they attempted to circumvent the judgment by filing suit against Shamrock Coal Company in State Court. Having been enjoined by the Bankruptcy Court from disregarding the terms of its judgment, the Defendants, for the first time, move for a stay of the judgment before this Court. Bank-

ruptcy Rule 8005 states that "a motion for a stay, judgment, order or decree of a Bankruptcy Court, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be made in the first instance in the Bankruptcy Court".

The Defendants' motion argues that the granting of the preliminary injunction by the Bankruptcy Court was the equivalent of denying" a stay and "assured the Trustee the right to proceed under the terms of said judgment even though said judgment is on appeal". The Defendants seem to have the positions of the parties reversed. A Court is not required to stay the effect of its judgment, nor is the prevailing party prevented from acting upon its judgment where the appellee has made no request for such a stay. Since the Defendants chose to ignore the Court's judgment rather than to seek a stay of its effect pending appeal, it cannot now argue that such relief could not have been obtained from the Bankruptcy Court.

In the event that a stay pending appeal is granted, Bankruptcy Rule 8005 provides that such relief may be conditioned upon the filing of bond or other appropriate security with the Bankruptcy Court. The Defendants argue that the Trustee will not be harmed by any delay because the coal has been in the ground for millions of years and will remain there. But the Trustee's power to lease the coal may suffer irreparable damage if the entry of the Option to Lease is stayed. Although the Trustee's predecessor in interest was granted a fee simple interest in the coal, payment for this interest can only be made through the royalties obtained in its mining. As has been pointed out, the Trustee owns no fee interest in the surface, but merely has the right to assume the executory portion of the Lease Purchase Agreement which allows entry on the premises for the purpose of mining the coal. Since the Trustee now has the Option to Lease which is potentially

worth $4 million, (the purchase option price granted in the Lease to Shamrock) and a stay of the Bankruptcy Court's judgment pending appeal could jeopardize this agreement, a stay of the judgment pending appeal should only be granted upon Defendant's posting of a bond securing the potential $4 million loss to the creditors of the estate.

WHEREFORE the Trustee respectfully requests as follows:

1. That the motion for leave to appeal the preliminary injunction be denied.

2. That the motion for a stay pending appeal be denied.

3. That, in the event the motion for a stay pending appeal is sustained, the Defendants be required to post a bond with a full cash value of $4 million as security with the Court.

Odell & Howard

(s) By: William S. Howard
William S. Howard
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Lexington, KY 40507
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EXHIBIT 3

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF KENTUCKY
AT LONDON

No. 72-650

In Re:

BECKNELL & CRACE COAL CO., INC.
DEBTOR
RUBEN G. HICKS, TRUSTEE - - - - *Plaintiff*

v.

TONY SLOAN, et al. - - - - - *Defendants*

A. P. No. 14

REPLY TO TRUSTEE'S ANSWER TO DEFENDANT'S MOTION FOR LEAVE TO FILE APPEAL

The Trustee's Answer to Defendant's Motion for Leave to Appeal contains such gross inaccuracies of fact and law that the Appellants, Sloans, feel compelled to take the unusual step of filing a reply thereto.

The opinion of the Sixth Circuit, 761 F. 2d 319 (1985) is attached hereto (Exhibit 1). The holdings of the Court are emphasized in yellow. This opinion constitutes the mandate of the Sixth Circuit and the law of this case. It must be followed literally, in letter and in spirit, and is not subject to change by erroneous interpretation of the Trustee or the Bankruptcy Court. See 1(B) Moore Federal Practice, Section 0.404(10), Page 169-174: *Hayes* v. *Thompson,* 637 F. 2d 483 (7th Cir. 1980).

The Sixth Circuit held:

"We believe that the terms of the Lease-Purchase Agreement granted Becknell a fee simple interest in the coal . . . The Lease-Purchase Agreement further provided that:

> *When One Million Dollars ($1,000,000.00) not including wheelage fees, has been paid to the party of the first part; party of the second part [Becknell] shall be and become owner in fee simple of all coal remaining on these premises".* (emphasis added)

"Through the Agreement of August 2, 1971, *Becknell . . . gave an option to immediately terminate the Lease-Purchase Agreement* in lieu of a presently exercisable option to terminate the Lease-Purchase Agreement . . ." (emphasis added)

"We believe that the contract is executory . . ."
". . . John Sloan, the Sloans, and Becknell had obligations to perform in the future. *As a result, the Lease-Purchase Agreement was executory.*" (emphasis added)

"Because the Lease-Purchase Agreement was executory the Trustee should have been given the opportunity to assume or reject the contract. See 11 U.S.C. Section 110. In the Bankruptcy proceedings the Trustee filed a petition for an extension of time to reject or assume the contract. The Bankruptcy Court, however, denied that petition as moot because it determined that the Lease-Purchase Agreement was not executory. The Trustee, therefore, did not have an opportunity to assume or reject the Lease-Purchase Agreement."

"We, therefore, AFFIRM, in part, REVERSE, in part, and REMAND . . . *We note that our decision does not alter*

the provisions of the contract . . . These blocks of coal as well as the surface rights were specifically reserved by the appellants." (emphasis added)

It is clear from the above quotes that the mandate does not say that the Agreement constitutes a "fee simple grant" (Trustee's words). The "fee simple interest" is not a fee simple title or grant. Since the Sixth Circuit quoted in its opinion one of the conditions precedent to obtaining ownership to the remaining coal, it obviously did not grant a fee simple absolute title as claimed by Trustee. A "fee simple interest" can be absolute, conditional, defeasible, or determinable. A copy of Black's Law Dictionary, 5th Edition, Page 554 is attached hereto to illustrate the difference (Exhibit 2).

The Sixth Circuit did not say that the contract was executory "for the use of the surface" (Trustee's statement). The entire contract was held to be executory.

The Sixth Circuit only quoted one example of Becknell's conditions precedent to obtaining a fee simple interest to the remaining coal. The entire contract contains other conditions, such as, mining 3,000,000 tons, mining 10 years at 300,000 tons per year, before title can be obtained to the remaining coal and the explicit rights of termination of the Lease-Purchase Agreement, all of which terms defeat a fee simple absolute.

Since the Trustee erroneously quotes the contract, a copy of the contract is attached hereto (Exhibit 3). Wheelage payments are named as *consideration for hauling coal not extracted from Sloans' land over Sloans' surface.* The Wheelage Agreement is on Page 12 of the Lease-Purchase Agreement. Wheelage payments are not consideration for use of surface for mining as claimed by the Trustee in his Answer.

The Sixth Circuit stated very clearly that it did not alter the terms of the contract. This does not mean that only those terms favorable to the bankrupt or to the Trustee are retained, and the other abolished. It means all of the terms, including the termination and cancellation clauses are not altered. The Sixth Circuit, additionally, saw fit to point out that the amended agreement gave Sloans a right of immediate termination. HOW CAN ANY OTHER COURT, EVEN JUDGE LEE, NOW REFUSE TO ENFORCE SLOAN'S IMMEDIATE RIGHT OF CANCELLATION

The right to terminate even after bankruptcy of an executory contract whether or not it has been assumed, is set out in many cases. Some of these cases have been made known to the Bankruptcy Court and to the Trustee such as, *In Re: Trigg*, 630 F. 2d 11370 (10th Cir. 1980); *Schokbeton Industries, Inc.* v. *Schokbeton Products Corp.*, 466 F. 2d 171 (5th Cir. 1972); *Good Hope Refineries, Inc.* v. *Benavides*, 602 F. 2d 998 (1st Cir. 1979).

The Sixth Circuit did not hold "that a portion of the Agreement was executory". (Trustee's Answer, Page 2) Trustee cannot pick and choose only terms favorable to him. *In Re: Ralston*, 401 F. 2d 293 at 296 (6th Cir. 1968). If a Trustee assumes an executory contract (which Trustee has not done here), "he assumes it cum onere—*that is, subject to all provisions and conditions of the contract.*" 2 Collier on Bankruptcy, Paragraph 365.01(1) at 365-9 (15th Edition). (Trustee failed to quote all the law here.)

By operation of law when the Trustee did not assume the contract within the statutory time limit, or was not granted an extension within that same time limit, he lost all rights that the bankrupt had under the terms of the executory agreement. Probably, this is why the Sixth Circuit did not award the Trustee any interest in the contract. (11 U.S.C. 1106, Bankruptcy Rule 607 and 906)

Contrary to the Trustee's statement, the Sixth Circuit did not hold that the Trustee was entitled to have his Motion for Extension of Time sustained at this late date.

The action filed by Sloans in Clinton County to enforce the Kentucky statutes and regulations in reference to surface mining speaks for itself. A copy of the Complaint and exhibits are attached hereto as a part of this Reply to Trustee's Answer (Exhibit 4).

Judge Lee had no jurisdiction to enjoin an action brought to enforce these statutes against third parties, and particularly, in the face of the Sixth Circuit mandate holding that the Sloans owned this surface. Is the Bankruptcy Court by such action condoning the violation of state statutes by third parties?

The Sloans objected and moved to dissolve the preliminary injunction (Exhibit 5). Sloans' objections and motions to dissolve were denied. They were enjoined from proceeding to protect their rights given by statute and the Sixth Circuit mandate (Exhibit 6). It is obvious that a further motion to set aside that injunction, made in the Bankruptcy Court, would be a vain and useless effort. This is why the appeal is sought in this Court.

Both the Trustee and the Bankruptcy Court seem to take the position that the Sixth Circuit has reinstated Judge Lee's opinion of 1976, in which he held that the Trustee had title to the coal. They seem to be confused as to exactly what decision, and what portions were affirmed or reversed by the Sixth Circuit.

It was the decision of Judge Siler in 1982, in this case, that was appealed to the Sixth Circuit. Judge Siler held that the bankrupt had received an estate for years (an estate for years is a lease), under the Lease-Purchase Agreement, subject to the contract rights of the Lease-Purchase Agreement to mine. Judge Siler further held that the Lease-Purchase Agreement was not executory.

Judge Siler then affirmed the Bankruptcy Court, subject to his opinion.

It was Judge Siler's opinion, which was affirmed in part and reversed in part, by the Sixth Circuit, not Judge Lee's opinion. Clearly, the Sixth Circuit reversed the non-executory holding of Judge Siler.

Since Judge Siler held that Becknell was granted an estate for years subject to the contract rights to mine and the terms of the Lease-Purchase Agreement, and, the Sixth Circuit has said that Becknell had a fee simple interest, quoting a condition precedent to obtain a fee simple interest to the remaining coal, it seems that these two holdings are the same, on this point. We believe the Sixth Circuit affirmed Judge Siler's opinion in this regard, which means that Becknell obtained an estate for years subject to contract rights, or in other words, a defeasible or determinable fee simple interest. We submit there is no other way to say that any other part of Judge Siler's opinion was affirmed. This certainly does not mean that any part of Judge Lee's opinion was affirmed.

Accordingly, under the Sixth Circuit opinion and Judge Siler's opinion, the Trustee can have no interest whatsoever in the Sloans lands or coal. The contract can never be performed, the 10 years have passed, the cancellation and termination clauses have taken effect. The contract has been terminated, and the statutory prohibition prevents the Trustee from now assuming the contract or trying to perform it at this date.

The Motion for Leave to Appeal was filed to obtain a fair hearing from this court on the motion to set aside the injunctions wrongfully issued, and to set aside the proceedings of the Bankruptcy Court outside its jurisdiction, and in violation of the Sixth Circuit Court mandate.

The Trustee's argument concerning a stay of proceedings and posting a bond have nothing to do with the right of appeal to set aside these proceedings.

It is respectfully submitted that the Motion for Leave to Appeal should be granted in order to carry out the mandate of the Sixth Circuit, enforce the terms of the contract, and to enforce the mandatory provisions of the Bankruptcy statutes and Rules governing the proceedings in this action.

Respectfully submitted,

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APPENDIX 19

PETITION FOR REHEARING, EN BANC, OF PETITION FOR WRIT OF MANDAMUS

PRELIMINARY STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that the Petition for Mandamus, for which this Petition for Rehearing is filed, involves one or more questions of exceptional importance, as set out hereinbelow, and that consideration of the full Court, en banc, is necessary to maintain and enforce the uniformity and integrity of the decisions of this Court, of other federal courts, and of the United States Supreme Court. These questions are:

1. Is the refusal of the Bankruptcy Court to recognize and obey the mandate of this Court, in the same case, after remand, such "exceptional circumstances amounting to a judicial usurpation of power as will justify the invocation of the remedy of mandamus"

2. What is required to show "a clear and indisputable right to the writ?"

3. Where the Bankruptcy Court has no jurisdiction, due to the fact that the mandate of this Court awarded the Trustee no interest in the Sloans' property, and due to the Trustee's failure to assure an executory contract over a period of 14 years, and where the right of termination given by the contract involved has been exercised, and, where this Court's mandate upholds the contract and recognizes assumption requirements, are the Petitioners entitled to the issuance of the Writ of Mandamus "to confine an inferior court to a lawful exercse of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so"?

4. Is the appeal process "adequate" when this case has been appealed before on the same facts and arguments, and which prior appeal consumed approximately eight years, and where the inferior court has palpably and flagrantly refused to recognize the decision of the first appeal?

5. Does the granting of the mandate in the instant case discourage "piecemeal" litigation, or does its refusal actually promote protracted "piecemeal" litigation and further appeals?

INTRODUCTION

The Order entered by the Clerk pursuant to the Order of Court by Circuit Judges Merritt and Jones and Senior Judge Edwards, on October 10, 1986, correctly stated that:

> Petitioners seek a writ of mandamus compelling the respondent, Judge Lee, (herein respondent) to comply with the exact and literal language of this Court's mandate; compelling the respondent to dismiss the trustee's Adversary Proceeding 14 for the reasons that this Court awarded the trustee nothing and the respondent lacks jurisdiction, if the trustee has no interest; compelling respondent to recuse himself; setting aside and voiding the judgment and orders entered by respondent after the recusal affidavits were filed; and directing the respondent to entertain no further proceedings on behalf of the trustee against the petitioners.

The panel then cited three cases, recognizing general principles as to issuance of mandamus, (1) that it is an extraordinary remedy, (2) that it should be granted only upon showing a clear and indisputable right, and (3) that there is no other adequate means to attain the requested

relief. Then, without in any way equating or relating the facts or the law of the case at bar to these general principles, the panel summarily denied the Petition for Writ of Mandamus.

The pleadings in this action consist of the Petition for Writ of Mandamus and exhibits thereto the Response of Respondent, Judge Lee, the Reply to the Response of Judge Lee and exhibits, the Response of the Trustee, and the Reply to Trustee's Response with exhibits. These pleadings and exhibits show the extraordinary and exceptional circumstances justifying the Writ of Mandamus in this case.

The first appeal to this Court is found in Cases No. 83-5846 and 83-5847. The judgment of this Court on appeal is *In re: Becknell and Crace Coal Company, Inc.,* 761 F. 2d 319 (1985).

ARGUMENT

The exceptional nature of the remedy of the mandamus, and its requirements, were recognized by Petitioners, who set out four Supreme Court cases enumerating these principles on page 19 of their Petition for Mandamus. The determination of what type of case or set of facts meets the exceptional or "extraordinary" standard is found in particular cases in which the writ was either issued or denied.

Kerr v. *United States District Court for the Northern District of California,* 426 U. S. 394, 402 (1976), cited by the panel herein, did not involve a willful disregard of the appellate mandate on remand, nor did it involve recusal. In *Kerr,* a mandamus was sought to compel vacation of two discovery orders by the lower court, wherein the lower court's decision had "left open an avenue far short of mandamus to achieve precisely the relief sought," namely an "in camera review" before turning over the documents.

A more recent case, *Will* v. *Calvert Fire Insurance Company,* 437 U. S. 655, 57 L. Ed. 2d 504, 98 S. Ct. 2552, (1978), although reversing a grant of mandamus issued by the Seventh Circuit, stated:

> the traditional use of the writ and aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction, or to compel it to exercise its authority when it is its duty to do so. *Roche* v. *Evaporated Milk Association,* 319 U. S. 21, 87 L. Ed. 11 (1985), 63 S. Ct. 938 (1943). Calvert makes no contention that petitioner has exceeded the bounds of his jurisdiction. Rather, it contends that the District Court, in entering the Stay Order, has refused "to exercise its authority when it is its duty to do so." *Ibid.* There can be no doubt that where a District Court persistently and without reason refuses to adjudicate a case properly before it, the Court of Appeals may issue the writ "in order that it may exercise the jurisdiction of review given by law." *Insurance Company* v. *Comstock,* 16 Wal. 258, 270, 21 L. Ed. 493 (1873), "otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the District Court obstructing the appeal." *Roche, supra,* at 25, 87 L. Ed. 1185, 63 S. Ct. 938."

In our case, we have contended, from the beginning, that the Respondent has exceeded the grounds of his jurisdiction. The cases holding that the Court has no jurisdiction when the executory contract has not been assumed by the Trustee, are overwhelming in authority. Seven of them are set out on page 2 and 3 of the Reply of Petitioners to Response of the Honorable Joe Lee, filed herein, and several more are set out on Pages 15 and 16 of Exhibit 1 herein.

Calvert, supra, also indicates that unauthorized action of the District Court obstructing or defeating appellate jurisdiction is grounds for issuance of the writ.

More specifically, in our case at bar, the Respondent, Judge Lee, has in effect reinstated his Judgment of 1976 (Exhibit 6, Petition for Writ of Mandamus), in which he held that the Trustee had title to the Sloan property, and, he has ignored the express language of the Sixth Circuit mandate which *carefully did not award the Trustee anything.*

The Supreme Court, in a case very much "on all fours" with our case, involving compliance with its mandate, which is precisely why this writ was brought, held that the mandamus to correct the lower court's misapplication of its mandate should be issued without delay. This case is *United States* v. *Haley,* 371 U. S. 18, 9 L. Ed. 2d 1, 83 S. Ct. 11 (1962), which states as follows:

> Under the remand ordered by this Court's judgment of February 24, 1959, there was thus left open to the District Court only the adjudication of Haley's above-mentioned procedural defense. The District Court erred in believing that it was not foreclosed from inquiring into this Court's jurisdiction over the Government's appeal and from reinstating its own original judgment in the case, which appears to have been the effect of its denial of the Government's motion for judgment following remand. See *Re: Sanford Ford & Tool Co.,* 160 U. S. 247, 255, 40 L. Ed. 414, 416, 16 S. Ct. 291.
>
> The District Court's error should be rectified without delay, and we think that the proper means for accomplishing this is by mandamus. 28 U.S.C. Section 1651; see *Re: Potts,* 166 U. S. 263, 41 L. Ed. 994, 17 S. Ct. 520; *United States* v. *United States District Court,* 334

U. S. 258, 263, 264, 92 L. Ed. 1351, 1355, 68 S. Ct. 1035. Accordingly, in No. 139, Misc., the Government's motion for leave to file a petition for a writ of mandamus, and its petition for a writ of mandamus, are granted.

We believe the *Haley* case, *supra,* is decisive of our case at bar; that *it requires the issuance of a mandamus to compel the inferior court to conform exactly with the mandate of the appellate court "without delay."* (Emphasis ours).

That the failure of the inferior court to confine itself to the appellate mandate is such an exceptional circumstance which justifies invocation of mandamus is further expressed in *Will* v. *United States,* 389 U. S. 90, 19 L. Ed. 2d 305, 88 S. Ct. 269 (1967), as follows:

> The peremptory writ of mandamus has traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21, 26, L. Ed. 1185, 1190, 63 S. Ct. 938 (1943). While the courts have never confined themselves to an arbitrary and technical definition of "jurisdiction," it is clear that only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy. *De Beers Consol. Mines, Ltd.* v. *United States,* 325 U. S. 212, 217, 89 L. Ed. 1566, 1572, 65 S. Ct. 1130 (1945). Thus the writ has been invoked . . .
>
> Where it was necessary to confine a lower court to the terms of an appellate tribunal's mandate, *United States* v. *United States Dist. Court,* 334 U. S. 258, 92 L. Ed. 1351, 68 S. Ct. 1035 (1948), and where a district judge displayed a persistent disregard of the Rules of Civil Procedure promulgated by this Court, *La Buy* v.

Howes Leather Co., 352 U. S. 249, 1 L. Ed. 2d 290, 77 S. Ct. 309 (1957);

The pleadings and exhibits filed in this action show the inferior court's absolute disregard for the mandate of this Court, its continued proceeding without jurisdiction, and its disregard of recusal statutes after proper Affidavits were filed. These facts meet the requirements of a clear and indisputable right to issuance of the writ in similar cases.

Respondent has ignored the conditions precedent expressed in the contract (Exhibit 2 and 3 of Petition for Mandamus herein), in that he has refused to recognize the termination of the contract under its terms, and, contrary to the Mandate language *"we note that our decision does not alter the terms of the contract"* (underlining ours). He has permitted Trustee to option and deal with Petitioners' property as if it were his own, and to enter the Petitioners' land when the Mandate awarded the Trustee nothing, and when the Mandate specifically recognized Petitioners' surface rights.

Mandamus is necessary to the effective exercise of the jurisdiction of the appellate court. It must be able to enforce its own decisions. As stated by 9 Moore Federal Practice, 110.28 at page 309, on Mandamus:

> It continues to be necessary, of course, to prevent District Judges from embarking on frolics of their own . . . and is used to prevent a Judge from proceeding contrary to a recent decision of the Court of Appeals.

We believe the case at bar meets these standards.

We believe that the Sixth Circuit retains jurisdiction over its mandate to prevent injustice. As is mentioned in *Home Life Insurance Company of New York* v. *Equitable Equipment Company*, 694 F. 2d 402 (5th Cir. 1982), the

Fifth Circuit has a rule to this effect. The Sixth Circuit recognizes its inherent power over its own mandate as shown in the case of *A to Z Portion Meats* v. *NLRB,* 643 F. 2d 390 (1981), in which it recalled its own mandate under a petition for clarification thereof, referring to *Perkins* v. *Standard Oil Company,* 47 F. 2d 672 (9th Cir. 1973), in which the Court of Appeals held that it has the power to recall and amend its mandate to protect the integrity of its own process. We believe that having this power, and the power given under F.R.C.P. 60, that this Court has not only the power to compel compliance with its mandate by mandamus procedure, but also the duty to do so, since no inferior court can interpret or change the mandate. Therefore, an appeal to the United States District Court from the noncompliance of the Bankruptcy Court would be futile.

In 9 Moore Federal Practice, Section 110.28 at Page 311 it is stated:

> It is rather pointless to list instances in which mandamus has been denied, because denial may be based upon nothing more than disinclination in a particular case.

However, examination of some of the mandamus denial cases sometimes reveals missing elements that the Court would have held sufficient justification. For instance, we believe that the facts of *In Re: Post-Newsweek Stations, Michigan, Inc.,* 722 F. 2d 325 at 329 (1983), are almost trivial rather than exceptional and extraordinary. Judge Nathaniel Jones, in the case of *United States* v. *Beckam* v. *Post-Newsweek Stations, Michigan, Inc.,* 789 F. 2d 401, 404 (6th Cir. 1986), summarizes the trivial nature of the *Post-Newsweek* mandamus proceeding, in referring to another attempt of the media to gain access to tapes and transcripts, as follows:

> Shortly thereafter, this Court issued its opinion regarding the denial of the media's mandamus petition. We found that the District Court had not rendered a final appealable Order, and that mandamus was not appropriate when the only conduct at issue was the discretionary granting of a 10 day delay for additional study and briefing. *In Re: Post-Newsweek Stations, Michigan, Inc.*, 722 F. 2d 325 (6th Cir. 1983).

In our case, we have a final and appealable Order, the terms of which are contrary to the mandate of this Court.

The next question, a more subjective one, is what constitutes an adequate remedy by appeal?

As mentioned in the Petition for Mandamus on page 21, Petitioners have taken an appeal. However, the real question is whether such an appeal is "adequate." Here, we have Orders from the inferior court permitting the Trustee and his agents to enter and substantially disturb and remove therefrom property of the Petitioners, which action was not sanctioned or authorized by the mandate of this Court. This action will continue even while an appeal is being prosecuted. As shown by the record on appeal of this case, Nos. 83-5846/47, the first appeal of this case began in November, 1978, ending with a denial of a Petition for Rehearing in July, 1985, and with denial of certiorari in January, 1986. In other words, the appeal process lasted almost seven years on the first appeal. We ask, does this constitute an "adequate" remedy?

Perhaps an even more compelling reason why the remedy in this case is not adequate by appeal is that it is this appellate court's own mandate opinion, which is being subjected to piecemeal interpretation by the lower courts. There is no assurance that the District Court on appeal will interpret the Sixth Circuit mandate exactly in accordance with its language, and again the appeal which took

seven years would be frustrated. Further appeal would be required.

We believe it is the duty of this Court to police its own decision. Only this Court who wrote the opinion can determine exactly what is meant by the language therein. Since we do not claim to be clairvoyant, and we will not guess at the Court's meaning, we have asked the lower courts to enforce the mandate literally. In other words, every word used in the Sixth Circuit mandate must be given its plain and ordinary meaning. *When the Sixth Circuit said: "We note that our decision does not alter the terms of the contract," then we believe the contract terms cannot be altered by the inferior court in* interpreting this decision (underlining ours). It seems to be contrary to ordinary common sense to say that the proper remedy here would be to ask another inferior court, namely the District Court on appeal, to interpret the language of this Court. Such simply cannot be an "adequate" remedy by appeal under the circumstances of this case.

We have not touched upon the appropriateness of the remedy for enforcing recusal. Of course, recusal in itself is an extraordinary remedy. It is the only instance in 37 years of practice in which the counsel for petitioners has sought recusal of a Judge. Without belaboring the point, there are many cases in which mandamus has been issued to enforce recusal, such as: *U. S.* v. *Ritter,* 540 F. 2d 459 (10th Cir. 1976); *In Re: U. S.,* 666 F. 2d 690 (11th Cir. 1981); *In Re: Rogers,* 537 F. 2d 1196 (4th Cir. 1976).

While we have read the litany in some cases that granting writs of mandamus encourage piecemeal litigation, and while this may happen in many such cases, this generality is not applicable to our case at bar. On the contrary, granting of the mandamus petition as prayed by the Petitioners herein would probably end this litigation. Another Judge would be appointed who certainly would have no

bias, and who, we hope, would enforce the law as written, and as applicable to the facts of this case. The granting of the mandamus petition would probably render unnecessary the appeal in this action. Certainly, it would save perhaps years during which Petitioners will have been further deprived of their property.

We have suggested to the District Court on appeal that this case be advanced on the docket, but, we are in sympathy with, and we recognize the workload that the District Court carries. We believe that this appeal could be decided very simply by this Court's issuance of its mandate, setting aside the Orders of the Bankruptcy Judge, and requiring him to recuse himself for the appointment of a Bankruptcy Judge from another district. In order that this Court might view for itself the urgency of a decision in this matter, we attach hereto as exhibits, a copy of the Brief on Appeal (Exhibit 1), a copy of the Trustee's Brief on Appeal (Exhibit 2), and a copy of the Reply Brief of the Defendants-Appellants ("Petitioners") herein (Exhibit 3).

CONCLUSION

We respectfully submit that the Petition for Mandamus herein meets all the requirements for mandamus; that it falls squarely within the Supreme Court decisions for issuance of mandamus to correct the misapplication by the lower court of the Appellate Court's mandate. We believe this Court has a duty to enforce its appellate mandate as written. Otherwise, an appellant can never be successful even though the appellate decision is in his favor. We earnestly believe that the granting of the Writ of Mandamus as prayed in this action would bring a quick end to this litigation.

We pray that the full Court will give its attention to this Petition, in the exercise of its equity powers; that it will grant Petitioners a hearing and set aside the denial of

mandamus herein; that it will grant the Petitioners the relief sought to which they are entitled under all the law and facts of this case, and, our principles of justice.

Respectfully submitted,

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APPENDIX 20

TRUSTEE'S RESPONSE TO PETITION FOR REHEARING, EN BANC, OF PETITION FOR WRIT OF MANDAMUS

Comes Ruben G. Hicks, Trustee of Becknell & Crace Coal Co., Inc., Bankruptcy Action No. 72-650, (Trustee), by counsel, and for his Response to the Petition for Rehearing, En Banc, of the Petition for Writ of Mandamus, submits the following.

The Petitioners have requested that this Court enter a Writ of Mandamus against the Hon. Joe Lee, Bankruptcy Judge for the Eastern District of Kentucky. The Petition asks that Judge Lee be compelled (1) to reverse his Order and Judgment in the Bankruptcy Court below and enter a judgment in favor of the Petitioners and (2) to recuse him-

self from any further action on the grounds that he is biased and prejudiced against the Petitioners. Responses to the Petition were filed by Judge Lee and the Trustee in this action. The Petition was denied by Order of this Court on October 10, 1986.

The Petitioners now ask that its Petition for Writ of Mandamus be reheard by the entire Sixth Circuit Court of Appeals, sitting en banc. The Petitioners cite no authority for the rehearing of its Petition for extraordinary relief, and give no basis for such a rehearing other than that Judges Merritt, Jones and Edwards "summarily denied" their Petition for Writ "without in any way equating or relating the facts or the law of the case at bar" to the laws governing the issuance of extraordinary writs. (Petition for Rehearing, p. 3).

In no way was this Court's denial of the Petition improper or unconsidered. The remedy of mandamus under 28 U.S.C. Section 1651 is ". . . a drastic one, to be invoked only in extraordinary situations." *Kerr* v. *United States District Court*, 426 U. S. 394, 48 L. Ed. 2d 725, 96 S. Ct. 2119 (1967), quoted at 426 U. S. 402. Issuance of such an extraordinary remedy is addressed to the sound discretion of the petitioned Court, and should only be granted where there is a clear and indisputable showing of exceptional circumstances amounting to a judicial usurpation of power. *Kerr, supra; Will* v. *United States*, 389 U. S. 90, 19 L. Ed. 2d 305, 88 S. Ct. 269 (1967). Accordingly, the writ should never be issued when there is an adequate remedy by appeal. *Schlagenhauf* v. *Holder*, 379 U. S. 104, 13 L, Ed. 2d 152, 85 S. Ct. 234 (1964).

Consideration of an action en banc is likewise an "extraordinary measure." Rule 14(b), Rules for the United States Court of Appeals for the Sixth Circuit. Rule 35 of the Federal Rules of Appellate Procedure states that it "is not favored and ordinarily will not be ordered except

(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." FRAP35(b). The Petition did not allege that an en banc proceeding was necessary to secure uniformity.

Since only extraordinary circumstances will permit extraordinary writs, and since they must allege there is a question of exceptional importance, the Petitioners presume that their situation is remarkable, when it is not. In every litigation, the party who lost could claim that the trial judge did not properly follow the mandates of the law. If the Petitioners are entitled to a Writ of Mandamus, then so is every litigant who does not win his case.

Throughout the long period of litigation, the Petitioners had maintained that the agreement of January 22, 1970 conveyed only a lease to coal and not a fee simple interest. After this Court in *In Re: Becknell & Crace Coal Co., Inc.*, 761 F. 2d 319 (1985), rejected the Petitioners' argument and ruled that a fee simple interest was created, the Petitioners asked for a rehearing and, being denied that, Petition for Certiorari from the Supreme Court. Both that Petition and the subsequent Request for Rehearing were denied, and the action was eventually remanded to the Bankruptcy Court level for litigation in accordance with this Court's decision. Having lost at every stage of appeal, the Petitioners simply declared a victory, arguing in the Bankruptcy Court that the Sixth Circuit had ruled in its favor all along. The Bankruptcy Court proceeded in accordance with this Court's decision and rejected the Petitioners' argument. Since he has ruled against them, the Petitioners conclude that the Hon. Joe Lee is biased and prejudiced. Since he will not accept their tortured interpretation of this Court's decision, they accuse him of purposefully usurping this Court's power and ignoring its mandate.

Despite their melodramatic personal attacks against Judge Lee, the Petitioners are actually in no different position than any other litigant who has not prevailed. Their situation is not extraordinary, but rather quite ordinary. Although Judge Lee's Order and Judgment have been appealed by the Petitioners to the U. S. District Court, as is the proper remedy for litigants who feel themselves so aggrieved, they argue that such an appeal is not "adequate." They informed this Court that pursuant to the Bankruptcy Court's Orders, the Trustee and his agents have entered onto the property which is the subject of this litigation. Only a mandamus from this Court can stop this or so they claim. The Petitioners do not inform this Court that they failed to move the Bankruptcy for a stay pending appeal pursuant to Bankruptcy Rule 8005. Again, the Petitioners are in no different position than any appellant who refuses for whatever reason to post a supersedious bond and stay the effect of a judgment.

It is also their argument that only this Court, and not the District Court, can accurately interpret the *Becknell & Crace, supra,* decision. If the lower Courts cannot be trusted to follow the mandate of the Court of Appeals, then shouldn't the Court of Appeals, hear, decide and determine all cases directly without reference or remand to any lower Court?

The Petitioners argue that if this Court granted its Request for a Writ, that action would "probably end this litigation." What the Petitioners mean is that if this Court will reverse its previous decision and rule in favor of the Petitioners, the Petitioners will have gotten what they desire and then will gracefully withdraw from the fight. Again, it is difficult to see how this makes them any different from any other party appealing from an unfavorable decision. Indeed, it was the Trustee's hope that the *Becknell & Crace, supra,* decision, after all Petitions for Re-

hearing and Certiorari had been denied, would bring an end to this litigation. After all, this Court's decision is the law of the case and cannot now be reconsidered. "This rule of 'the law of the case' is a salutary rule, necessary as a matter of policy in order to end litigation. It is based upon the ground that 'there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a Court to listen to criticisms of their opinions, or speculate of chances from changes in its members'." *General American Life Insurance Company* v. *Anderson,* 156 F. 2d 615, 618 (6th Cir. 1946) quoting *Roberts* v. *Cooper,* 20 How 467, 481 15 L. Ed. 969 (U. S. 1858).

CONCLUSION

The Petitioners have shown no compelling reason to have this Court either rehear the Petitioners' Request for Writ of Mandamus or for this Court to consider this matter en banc. The Petitioners have taken an appeal of the Bankruptcy Judge's ruling to the District Court. There is no reason to treat this action differently than the thousands of other cases which enter the appellate process.

Respectfully submitted,

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APPENDIX 21

REPLY OF PETITIONERS TO RESPONSE OF TRUSTEE TO PETITION FOR REHEARING, EN BANC, OF PETITION FOR WRIT OF MANDAMUS

We regret the necessity of replying to the Response of the Trustee to the Petition for Rehearing, en banc, herein.

However, we cannot accept the misstatements and inaccuracies contained in Trustee's Response. In fact, the Trustee does not respond to the facts or the law set out in the Petitioner's pleadings before this Court in this Petition for Mandamus proceeding. Most of the innuendo and twisted inferences of Trustee's Response, which are similar to those contained in Exhibit 2 of the Petition for Rehearing, have been answered by the Petitioners in Exhibit 3 of the Petition for Rehearing. We respectfully ask the Court to read these two exhibits in order to get a better overall picture of the falacious and distorted argument of the Trustee.

Trustee makes no argument and cites no law contrary to that cited by the Petitioners in their pleadings in this action. Instead, the Trustee tries to make the Petitioners appear to be the "bad guys" in this drama, by his clever insinuations.

For instance, page 1 of Trustee's Response says: "The Petitioners ask that Judge Lee be compelled to reverse his Order and Judgment in the Bankruptcy Court below and enter a Judgment in favor of Petitioners . . ."

Page 32 of the Petition for Mandamus, herein, sets out the prayer of the Petitioners, which seeks literal compliance with this Court's mandate, dismissal of the Trustee's action for lack of jurisdiction of the Bankruptcy Court, disqualification of Judge Lee for demonstrated partiality to the Trustee, and the setting aside of Orders for Recusal were pending.

Obviously, there is a great difference between the prayer of the Petition for Mandamus and the above statement of the Trustee.

On Page 2 of his Response, Trustee states: "Petitioners cite no authority for rehearing of its Petition". Apparently, Trustee did not read the Petition for Rehearing thoroughly because authority is cited therein for granting the Petitioners' extraordinary relief on page 2, 6, 8, 9, and 11 thereof.

In the "Introduction" of their Petition for Rehearing, Petitioners summarize and analyze, in the first two paragraphs thereof, the Order entered by this Court on October 10, 1986, denying the Petition for Mandamus. Referring to the three cases cited by the Order, which recognized three generalities of mandamus, Petitioners then stated that "Without in any way equating or relating the facts or the law of the case at bar to these general principles, the panel summarily denied the Petition." Trustee twists this language as referring to the "laws governing the issuance of extraordinary writs" (page 2 of his Response), and then implies that, thereby, the Petitioners have accused this Court of acting improperly or without consideration by his statement, "In no way was this Court's denial of the Petition improper or unconsidered". Such veiled innuendo is ridiculous, and we trust this Court would recognize the superficiality of such statements.

Page 3 of Trustee's Response is even more unbelievable. Extraordinary circumstances are shown throughout this case, such as, flagrant refusal of the Bankruptcy Court to obey this Court's literal language in its mandate, such as, fourteen (14) years of litigation seeking to remove the Petitioner's property from the clutches of the Trustee, such as, absolute adamant refusal of the Bankruptcy Court to recognize the rights of cancellation, such as, lack of jurisdiction of the Bankruptcy Court, and the absolute

refusal of the Trustee to assume the contract for a period of at least thirteen and one-half (13½) years since his appointment.

Such statements as those on page 3 of Trustee's Response that "in every litigation, the party who lost could claim that the Trial Judge did not properly follow the mandates of the law. If the Petitioners are entitled to a Writ of Mandamus, then so is every litigant who does not win his case" are really inane and somewhat juvenile to say the least. Of course, the fact that Petitioners are entitled to mandamus under the facts and law of this case does not entitle every losing litigant to a writ of mandamus, and, of course (every losing litigant cannot claim that the law was not followed.

Trustee also states on page 3 that "having lost at every stage of appeal, Petitioners have declared a victory." This statement is in total disregard of Judge Siler's ruling that the contract granted an "estate for years subject to the limitation that it mine the property according to the terms of the agreement in issue and a contract right to mine or remove the coal underlying the surface." Remarkably, the Trustee thereby, not only ignores Judge Siler's language, but also the language of Judge Jones, of this Court, both of whom obviously, and patently, awarded the Trustee nothing, and both of whom obviously overturned the Bankruptcy Judge's holding of 1976 that the Trustee had a fee simple title. It would appear quite clear that the Trustee has persuaded the Bankruptcy Judge to also ignore both Appellate Court's opinions.

The fact that the Petitioners sought certiorari in the Supreme Court of the United States to clarify such questions as the passing of fee simple title in Kentucky, denial of rights of termination by contract, and other related questions, was denied, has absolutely no bearing on this

case. Counsel will not belabor this Court by citing well-known law to that effect.

Counsel will not continue with each sentence of the Trustee's Response to show that it is not applicable to the facts and law herein. Analysis of some of the language of the first three pages set out above should be sufficient since the same theme extends through the Trustee's Response. In fact, the Trustee makes no serious argument against the facts and law set out in these pleadings by the Petitioners.

CONCLUSION

Trustee's Response cites no fact or law contrary to the Petitioners, and in support of his contentions. He does not mention the undisputed fact that this executory contract was undeniably canceled since early 1972, that the property was not "mined according to the contract" since 1971. He ignores all the case law upholding such cancellation cited by Petitioners in their mandamus proceeding herein. He ignores the irrefutable case law that the Trustee has no interest in executory contract property unless the contract has been properly assumed by him, and that the Bankruptcy Court has no jurisdiction unless such contract has been properly assumed. These cases are cited by Petitioners in this mandamus action. It has been demonstrated that the Trustee has not properly assumed the contract in the past fourteen (14) years.

His only response is to rely on the old adage that "the best defense is attack", and he accuses the Petitioners of such things as "declaring a victory", "melodramatic personal attacks." We regret that such tactics must be called to the attention of this Court by this Reply.

In this action, the Bankruptcy Court has in effect reinstated its judgment of 1976 in which it held that Trustee

had fee simple title to the property. *Haley* v. *United States,* 371 U. S. 18, 9 L. Ed. 2d 1, 83 S. Ct. 11 (1962), cited on page 5 and 6 of the Petition for Rehearing, en banc, herein, is precisely in point. It requires the issuance of mandamus "without delay" to compel compliance to the Supreme Court judgment on remand of that case where the lower court had, in effect, reinstated its own original judgment. No response is made by the Trustee to this case, nor to any other specifically applicable cases cited by Petitioners, such as, *Thompson* v. *Texas-American Railway,* 66 S. Ct. 937, 328 U. S. 134, 90 L. Ed. 1132 (1946).

We respectfully submit that Petitioners have shown the "extraordinary circumstances" and undeniable case authority applicable to such circumstances, which require the issuance of mandamus prayed for herein.

Respectfully submitted,

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